No. 52971-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE RESTRAINT OF:

BRADLEY DAVID KNOX,

Petitioner

RESPONSE TO

PERSONAL RESTRAINT PETITION

Judgments in Cowlitz County Superior Court
No. 14-1-00095-0
No. 14-1-01283-4
The Hon. Michael Evans, Presiding

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A. AUTHORITY FOR RESTRAINT

The petitioner is restrained by order of the Cowlitz County Superior Court in cause numbers 14-1-00095-0 and 14-1-01283-4. The written basis for restraint is a pair of Judgment and Sentence documents attached hereto as Exhibit 1.

B. FACTUAL BASIS FOR RESTRAINT

In late August of 2014, Brad Knox was in jail charged with numerous crimes stemming from two incidents.

In Cowlitz County cause #14-1-00095-0, he was accused of possession of methamphetamine with intent to sell with firearm and school zone enhancements, being a felon in possession of a firearm, and jumping bail. PRP Exhibit 1.

This stemmed from a search warrant served on the property at which he resided, 909 California Way in the city of Longview within Cowlitz County. Exhibit 3 (hereafter referred to as RP) 475 (Knox lived in a motor home on the property), 399 (Longview, Cowlitz County, search warrant service). The police had requested the warrant upon developing information that Knox had methamphetamine, sale and use paraphernalia for the methamphetamine, guns, and money. RP 400. On Friday, January 17, 2014, the Longview Police had pulled Knox over as he left home, detained him, and advised him of the warrant. RP 400-401. He had $2,045 in cash

on his person at the time. RP 402. As the officers searched the motor home, Detective Seth Libbey conversed with Knox. During that conversation, Knox confirmed he lived in the motor home on the property, told the detective where he hid his methamphetamine and how much there would be, and explained that he was a low-end drug dealer who was not moving large amounts of product. RP 479 (location and amount of meth), 547 (scientific testing confirms it is meth), 480 (low-level drug dealer). When officers located guns in his motor home, he explained that he needed a firearm to protect himself because he had been robbed in the past. RP 480.

The methamphetamine was where Knox said it would be and in the amount indicated. RP 481. Also on the property were two semi-automatic pistols with ammunition, a 9mm and a .45. RP 450 (9mm Hi-Point with two magazines), 403 (Intratec .45, loaded, with one magazine and a leather holster), 451 (9mm ammunition). Also located were "a large amount" of small Ziploc baggies often used to package illegal narcotics for individual sale, a digital scale in the same living area, a glass pipe of the sort used for smoking methamphetamine, a box of Knox's business cards, and some of Knox's mail. RP 404. In a different area there were two more of the little baggies, each with crystalline residue within. Id.

Knox was charged on January 23, 2014, and a bail bond was issued for his release on February 20, 2014. RP 518-19. His failure to appear at a court date scheduled for May 5, 2015, resulted in an additional count of bail jumping. RP 522. However, he bailed out on a new bond.

That was the first incident. The second occurred on Friday, August 22, 2014, while the drug charges were pending. RP 489. In this incident, Knox and one Hailey Crookshanks got into a disagreement while Knox was driving her in a Jeep near the intersection of Isaacson Rd. and Kelso Ave. in Cowlitz County. RP 490 (address), 640 (the two argued over a cell phone). The quarrel turned physical, with Crookshanks trying to jump out of the vehicle with a backpack while Knox held onto it. RP 493. While the two struggled, Crookshanks screamed for help. RP 493-4. Nathan McCoy, a motorcyclist who happened to be passing by and had no connection to any of the principals in this case, ended the fight by walking up to the Jeep when it stopped and taking the bag from both parties, then calling 911 so the authorities could sort things out. Id. This incident led to charges of unlawful imprisonment and unlicensed driving being filed against Knox on August 27, 2014. PRP Exhibit 2.

After the August 22 incident, Knox went to jail. RP 779-80. On the 28th of the same month, Otis Pippen was incarcerated in the same jail on drug charges and an attempt to tamper with evidence. RP 573 (date), 568 (charges). Pippen contacted authorities on October 16, 2014, alerting them to the plan that Knox had developed to ameliorate his troubles. RP 567. Knox had taken steps to to shift the blame for his drug and gun offenses to Cassandra Crimmins, a friend of Knox's who, he said, had been on the property near the day he was arrested, and liked guns. RP 802 (on the property recently), 806 ("Cassie liked guns"). But that plan had hit a snag. Knox had paid Crimmins and Steven "Bulldog" Walker to take

responsibility for his drugs and guns, but was still waiting for them to do it. RP 603-604 (they were to "take the charges" instead of Knox), 675 (Walker a/k/a Bulldog). Although they had not kept up their end of the bargain, they had purchased a truck with Knox's money. RP 606. (At trial, Knox allowed that Crimmins and Walker "hurt" and "upset" him, but claimed it was because they never visited him in jail. RP 790-91.)

Knox adjusted his plan after Crimmins and Walker betrayed him: he tried to hire his fellow prisoner Pippen to murder Crimmins, Walker, and also Hailey Crookshanks, the victim in his unlawful imprisonment case. RP 605. But Pippen went to the authorities, revealed the offer, and agreed to help investigate Knox in exchange for consideration on his own charges. Aside from giving testimony about the plan's early stages, RP 602 et. seq., Pippen also wore a concealed recording device on October 8, 2014, to capture one of the later conversations Knox had with him. Since the transcript at trial is incomplete, that recording is attached so this court can hear what the jury heard. (The State suggests beginning at the two-hour mark, since before that is a lengthy four-handed game of cards probative only to counter the notion Pippen immediately sought Knox out and began to badger him.) In the recording, Knox backtracks on the notion of killing Crimmins and Crookshanks but remains firm that "Bulldog" Walker should die as an example to Crimmins. Exhibit 2.

Pippen testified that after that recorded conversation, Knox changed his mind and decided "the hell with it," Pippen should just kill all three. RP 617. As a result, when Knox stood trial in a combined case that included the

drug, gun, bail jump, and unlawful imprisonment charges, he also faced charges for the solicitation to murder each of the three.

However, of the three solicitation charges, the jury convicted Knox only of soliciting the murder of Walker – the only one that was audio recorded. Knox was also acquitted of the unlawful imprisonment count. He was convicted on the drug, gun, and bail jump charges in addition to one count of solicitation to commit murder. (The State dismissed the license suspension count. RP 86.)

C. STATEMENT REGARDING MATERIAL DISPUTED QUESTIONS OF FACT

RAP 16.9 (a) states the Respondent "should... identify in the response all material disputed questions of fact." The State hereby declares that if any fact averred by the defendant would in any way dispute, refute, rebut, negate, undermine, or undercut any fact in the record or verdict of the jury, it is a disputed question of fact. Unless the State specifically disavows a fact adduced at trial, the State should be viewed as adhering to the settled record in total, and to the extent anything said or averred by the defendant would stand in contrast with any fact from the record, the State disagrees with and disputes that fact. This includes any "opinion," be it by expert or lay person, which purports to dispute, refute, rebut, negate, undermine, or undercut any fact adduced at trial or any verdict rendered by the jury.

If the fact in question is germane to this Court's consideration of the personal restraint petition such that the petition cannot be decided without settling the matter, this Court is then required by RAP 16.11 to remand this

matter to the Superior Court for a reference hearing, wherein a proper trier of fact can settle the dispute. An appellate court is not a trier of fact and cannot settle factual disagreements. State v. Rafay, 168 Wn. App. 734, 822, 285, P.3d 83 (2012); State v. Macon, 128 Wn.2d 784, 801-02, 911 P.2d 1004 (1996). A party is not required to specifically request a reference hearing to trigger the appellate Court's duty to hold one in the event this Court determines there is a disputed fact that must be settled. Nonexclusive specifics follow.

The petitioner's arguments in this case often hinge on two types of allegation: first, that certain attorneys involved in the case represented certain people at certain times and places; second, that because of that representation certain things must or might or would have happened. The State generally does not dispute that the attorneys (and judge) named in the petition did represent the people indicated. The State denies, and, in the event it becomes relevant, requests reference hearings regarding, any allegation of when or whether the petitioner or any attorney learned of such representation. Further, the State denies any averment about what the petitioner or any attorney must or may have learned during the course of that representation, about how that representation affected future behavior, and about what effect that representation may have had on this case. The State denies any declaration by petitioner or counsel in which they swear to what they would have done (e.g. move to recuse the judge, ask for a different lawyer, ask different questions, work harder to find certain witnesses).

The State denies any allegation that its witness Otis Pippen is a child molester – the State investigated him twice and would have proved it if it could have – and particularly denies the notion the defense floats that the state knew he was one and protected him. The defense spends most of pages 6-11 of its brief on this fiction; the State denies it entirely.

The State denies the entirety of the statement of Jerry K. Larsen at 32-38 of the petitioner's exhibits; the statement purporting to be from Cassandra Crimmins at 89; and the petitioner's declaration at 776.

D. ARGUMENT WHY RESTRAINT IS LAWFUL

I. Regarding Claimed Brady Violations

The collateral relief afforded under a personal restraint petition is limited, and requires the petitioner to show that he was prejudiced by the alleged error of the trial court. In re Pers. Restraint of Hagler, 97 Wn.2d 818, 819, 650 P.2d 1103 (1982). There is no presumption of prejudice on collateral review. Id. at 823. With respect to claims of Brady violations or ineffective assistance of counsel, the prejudice element of a petition is established by showing "a reasonable probability that the outcome of the proceedings would have been different" absent the Brady violation or ineffective assistance of counsel. In re Pers. Restraint of Crace, 174 Wn.2d 835, 845, 280 P.3d 1102 (2012), referencing Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

To establish a Brady violation, the petitioner must demonstrate the existence of each of three necessary elements: first, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" second, "that evidence must have been suppressed by the State, either willfully or inadvertently;" and third, "prejudice must have ensued" such that there is a reasonable probability that the result of the proceeding would have differed had the prosecution disclosed the evidence to trial counsel. Strickler v. Greene, 527 U.S. 263, 281-82, 289, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). If a defendant fails to demonstrate any of the three elements, his Brady claim fails. Id.; State v. Sublett, 156 Wn.App. 160, 199-201, 231 P.3d 231 (2010), aff'd, 176 Wn.2d 58, 292 P.3d 715 (2012).

Police investigated cooperating witness Otis Pippen for various sex crimes, but, due to lack of evidence, he was never prosecuted. The petitioner claims, without argument, that the state's failure to disclose this information is a Brady violation. But it has only established one of the three necessary elements: that the State willfully or inadvertently failed to disclose the information. Neither through argument nor citation does the petitioner show the information that the witness was unsuccessfully investigated for sex crimes is exculpatory under the Strickler test, supra.

Nor could Pippen be impeached by an unproved accusation. "ER 608 applies when nonconviction evidence is offered to attack a witness' character for truthfulness, while ER 609 applies when conviction evidence is offered to attack a witness' character for truthfulness." Loeffelholz v.

C.L.E.A.N., 119 Wn.App 665, 708, 82 P.3d 1199, 1221 (2004). And the jurisprudence under ER 608(b) is clear: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."

"[T]he rule is well established that witnesses may not be impeached by means of evidence of prior acts of misconduct. State v. Emmanuel, 42 Wn.2d 1, 253 P.2d 386 (1953); State v. Belknap, 44 Wash. 605, 87 Pac. 934 (1906)." State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727, 731 (1968). The petitioner, who has the burden, merely assumes that unproved allegations of child molestation can be used as impeachment against someone who says he will not be a party to murder. This assumption is contrary to the rules of evidence and therefore unwarranted.

The petitioner also invokes Brady in an argument that the State should have done more to emphasize the importance of witness Cassandra Crimmins to this case. The petitioner admits that he himself had made his defense aware of an incident the petitioner now claims would have exculpated him. PRP at 35. But he now claims that even though his attorneys could have investigated this incident further and did not, the State should have handed over the information the defense did not know about that incident. Id. This claim fails because "[e]vidence that could have been discovered but for lack of due diligence is not a Brady violation." State v. Lord, 161 Wn.2d 276, 293, 165 P.3d 1251, 1261 (2007). The Lord court went on to trenchantly observe, "Every trial attorney must make difficult

decisions regarding the allocation of resources. The first defense counsel did so in choosing other defenses, which were more likely to succeed." Id., 161 Wn.2d at 294. The changeable Ms. Crimmins was a slender reed upon which to hang a defense; she serves the petitioner much better now as a road not taken. Since the defense knew about the incident and the witness, the petitioner cannot sustain his burden.

II. Regarding Claimed Conflict of Interest

A convicted defendant claiming in a personal restraint petition to have had an attorney laboring under a conflict of interest at trial must first prove this. The petitioner "must demonstrate that he has competent, admissible evidence to establish facts that would entitle him to relief, and "must state particular facts, which, if proved, would entitle him to relief." Those "alleged facts must amount to more than speculation, conjecture, or inadmissible hearsay." State v. Jensen, 125 Wn.App 319, 332, 104 P.3d 717, 724 (2005).

Even then, "To establish a Sixth Amendment violation, a defendant who did not object at trial must demonstrate that an actual conflict of interest adversely affected his attorney's performance." Id., 125 Wn.App at 330.

Note what the Jensen court said would NOT entitle the defendant to relief in a personal restraint petition, even if a conflict was established:

> Jensen claims that: (1) [his attorney] Phelps had short, infrequent contacts with him; (2) they discussed his case only the weekend before trial; (2) Phelps failed to check A.S.'s school records to determine if she was absent or distressed during the time the molestation occurred; (3) Phelps failed to

> speak with A.S.'s friends or locate and interview A.S.'s half-brother, D.; (4) Phelps failed to call Jensen's wife as a witness; and (5) Phelps did not inspect the physical layout of Jensen's home to verify whether A.S.'s story was even possible. Jensen also claims that immediately after the jury verdicts, Phelps "apologized for his performance in trial, and admitted that he had not properly and adequately prepared for [Jensen's] trial." Jensen provides no statements from the possibly favorable witnesses. Thus, we cannot say on this record that he was prejudiced as we ordinarily measure it--the result would likely have differed absent the conflict.
> Jensen, 125 Wn.App. at 333.

Even under those remarkable conditions, the Jensen court only reversed because under the procedural posture of that case, it did not have to hold itself to the "heightened threshold requirements usually applicable to personal restraint petitions." Id. Those heightened threshold requirements do govern here, and the appellant in Jensen could claim far greater prejudice than any claimed by our petitioner. The Jensen court would have affirmed this case.

The petitioner cites to State v. Regan, 143 Wn.App. 419, 177 P.3d 783 (2008), for the rules regarding conflict of interest, because the Regan case is the most factually egregious in the state. In that case, a direct appeal, the attorney then representing the defendant on a bail jump charge had been in the courtroom representing the defendant on the day the defendant failed to appear. Regan, 143 Wn.App. at 424. The trial court required the defendant's own counsel to testify against him. Id. This is the sort of fact pattern that would make any court instinctively seek grounds for reversal, but the Regan court knew it could not reverse based on its preference. The conflict of interest created by the court was not enough by itself to justify

reversal. Rather, "the conflict (1) "'must cause some lapse in representation contrary to the defendant's interests,'" State v. Robinson, 79 Wn.App. 386, 395, 902 P.2d 652 (1995) (quoting Sullivan v. Cuyler, 723 F.2d 1077, 1086 (3d Cir. 1983)), or (2) have "likely" affected particular aspects of counsel's advocacy on behalf of the defendant, United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992)." Regan, 143 Wn.App. at 419.

The only reason the Regan case was reversed – even with defense counsel testifying against the defendant – was that the procedural posture of the case was such that in order for defense counsel to testify, a continuance of the trial date was required. Regan, 143 Wn.App. at 429. Regan did not want a continuance and experienced "consternation" when his defense team agreed to it over his objections, so that he would have adequate counsel standing by during his own attorney's testimony. Id. It was this dilemma – not the fact of the conflict itself – that justified the reversal of Regan's case. Id. This was the "particular aspect of counsel's advocacy on behalf of the defendant" that was "affected" in the Regan case. Id. at 429.

Because of the conflict of interest in Regan, the defendant suffered a lapse in representation that affected his interests. He had the choice between this lapse affecting him because he would have inadequate counsel during his attorney's testimony or it affecting him because to avoid the first outcome he would have to request an unwanted continuance. The Regan court ruled, sensibly, that the choice was not a cure for the prejudice, any more than having a choice between two diseases is the same thing as having good health.

This is not the Regan case, however. The petitioner here cannot point to a single instance in which any of his claimed conflicts of interest adversely impacted him. Instead, he resorts to precisely the "speculation, conjecture, and hearsay" the Jensen court warns against – inviting the court to speculate about what his attorneys may have learned from Mr. Sullivan in its brief at 18, and speculating about the reason his attorney – while she cast blame on Sullivan – did not assure his appearance at trial, again at 18. (The petitioner seems to think that having Mr. Sullivan on hand to defend himself against the accusation that he was the true owner of illicit drugs was a better idea than having him absent and unable to deny it—a conjectural hypothesis at best.)

It is even stranger that the petitioner spends such time creating a bewildering web of connections and characterizing them as conflicts – even acknowledging petitioner's own attorneys were likely unaware of them ("Ms. Baer appeared to act in many ways as if there was no conflict at all," again at 18) – without taking that reasoning to its obvious conclusion. If the petitioner's attorneys were unaware of the conflicts posited by the petitioner, their representation could not have been adversely affected by them. Considering the burden is the petitioner's, Jensen, supra, the conclusion the petitioner guides us towards is decidedly unhelpful to his cause.

In an effort to surmount this difficult burden, both petitioner and his counsel aver, at each instance of potential conflict, that if he or his counsel had known about the issue, he, she, or they would have moved for recusal. E.g., Affidavit of Simmie Baer at paragraphs 8 and 12.

Such reasoning is circular. Recusal is an attempt to avoid harm by eliminating the vector from which it might come. One does not prove harm by proving one would have tried to avoid harm. It is similarly futile to claim, as the required "lapse in representation contrary to defendant's interests likely affecting advocacy," that the petitioner would have sought recusal. If such a claim automatically results in reversal, there would be no need for the standard set out in State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003), which the Regan court interpreted. Not many prisoners would refuse to sign an affidavit claiming he would have attempted to recuse the judge if their freedom depended on the signature. This is why hindsight-driven speculation is insufficient to carry such a burden. See Jensen, supra.

The petitioner, in his argument regarding this issue, repeats the error he made when he attacked the alleged Brady violations: he spends his energy attempting to establish the fact of the violations, then hopes this court will consider their very existence to be proof of the second thing he is required to show in his petition: detriment. But there is no evidence that petitioner's attorneys treated him differently on account of any conflict, or that any of his prior attorneys used any information they knew about him against him – or, indeed, that anything about him, his case, or the witnesses in it were so unique that anyone could be expected to remember them well enough consciously be in a conflict situation. Since the petitioner cannot prove a lapse in representation contrary to his interests, much less any likely

effect on advocacy either for or against him, he is not entitled to relief from personal restraint on these grounds.

III. Regarding Prosecutorial Recusal

The main authorities cited by petitioner to support his argument that the Cowlitz County Prosecutor's Office should have recused itself entirely are State v. Stenger, 111 Wn.2d 516, 760 P.2d 357 (1988), and the unpublished case of State v. Fox (No. 48466-8-II, 4/4/17) (unpub., attached hereto as Exhibit D). These are cases in which the alleged conflict is that the elected prosecutor is a former defense attorney who, while defense attorney, directly represented the defendant in the very case the defendant appealed. And in that, they do not resemble this case at all. Here, the conflict alleged on the part of the elected prosecuting attorney is that, while he was a defense attorney, he "briefly" (before conflicting out) represented a person, Mr. Tubbs, who might have been a witness in a case against a person, Mr. Sullivan, who might have been a witness in this case (but, in fact, was not). PRP Brief, 21-22.

In other words, the petitioner is trying to expand the most drastic remedy available – automatic presumption of prejudice and reversal for new trial with the entire prosecutor's office recused – from situations in which the prosecuting attorney himself both personally defended and then personally prosecuted the same defendant in the same case, to any case in which there are common witnesses up to two degrees of separation between a former client of a prosecutor and the current defendant. But this is not the law. The prosecutor's alleged conflict here – that he represented a non-

witness in the case of a non-witness in this case – is not even conclusively established to be a conflict at all, much less one that merits the most severe and stringent remedy.

We cannot decide this case using the test from Stenger that limits itself to times when "the prosecuting attorney (as distinguished from a deputy prosecuting attorney) has previously personally represented the accused in the same case or in a matter so closely interwoven therewith as to be in effect a part thereof" – Stenger, 111 Wn.2d at 522. "As recognized in Stenger, 111 Wn.2d at 522-23 & n.15, a conflict based on a private attorney's prior representation is automatically imputed to other attorneys in the same law firm. RPC 1.10. But there is no similar rule for government lawyers. See RPC 1.11. Instead, the conflict rules for government lawyers are assessed more narrowly, according to each lawyer's individual circumstances." State v. Nickels, -- Wn.App. --, 434 P.3d 535, 539-40 (Div. III, 2019).

The Nickels opinion examined Stenger deeply, and noted that the Stenger court based its stringent remedy on the fact that the elected prosecutor learned privileged information regarding the defendant in the instant case. Nickels, 434 P.3d at 541. The other key to the Stenger ruling was that it was a death-penalty case, in which, unlike any other case, all past information about the defendant was potentially relevant to whether the ultimate penalty should be imposed. Id. The Nickels court argued against a rule that would widely recuse prosecutors. "[T]he recusal standard should not be so broad as to limit the pool of qualified attorneys who might work in

government service." Id., 434 P.3d at 542. The Nickels case concerned a case that resembled Stenger: the elected prosecutor had represented the defendant in the very same case, and furthermore, Nickels was charged with the very serious crime of first degree murder. Id. But otherwise, the Nickels court would likely have come to a different ruling than the one the petitioner urges. And, based on its reasoning, the Stenger court would have come to a different conclusion here as well.

The Stenger standard does not apply to the supposed conflict of deputy prosecutor Tom Ladouceur. "Whereas particular facts may require disqualifying an entire office based on the elected prosecutor's previous involvement in a case, the same action does not follow from a deputy's involvement and disqualification. In that instance, where the deputy can be effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecuting attorney is disqualified, then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise." State v. Schmitt, 124 Wn.App 662, 668-69, 102 P.3d 856, 860 (2004), quoting Stenger, 111 Wn.2d at 523 (internal quotes omitted). In the Schmitt case, the Court of Appeals held that a trial court abused its discretion when it recused an entire prosecutor's office because one deputy was a material witness and would testify for the defense. Schmitt, supra.

Here, the petitioner says that in an unconnected criminal investigation, Ladouceur previously declined on grounds of the sufficiency of the evidence to prosecute a witness in this case. He claims this

constitutes a showing of conflict of interest by the standard required in a personal restraint petition, which is a preponderance. In re Pers. Restraint of Cross, 180 Wn.2d 664, 671, 327 P.3d 660 (2014). Even when the allegation is added that during his time as a defense attorney, Ladouceur represented the same witness in another criminal case unrelated to any of the others, the petitioner is a long way from shouldering his burden to show that there was any conflict of interest. Much less has he overcome the next hurdle by establishing a failure of the steps he admits the prosecutor's office took to keep Ladouceur away from the case. The petitioner is even farther still from showing that any such error resulted in harm, and farther yet from showing harm that would rise to a level that would give him the remedy he seeks, which has been reserved solely for instances in which elected prosecutors who have represented the defendant on the same case currently being prosecuted interfere with that prosecution in a way adverse to the petitioner.

The petitioner's miscellaneous claims of conflict all fail for the same reasons his other claims so far have failed: he attends solely to the task of finding an argument that the claim exists, without making any real attempt to prove that their existence caused any sort of prejudice to him. Sometimes he admits as much, as when he claims the prejudice that was shown because his attorney Ms. Baer worked for the same public defender's office as the one representing Mr. Sullivan, on whom he tried to blame his drug and firearm crimes, was that "it really is not known how the joint representation and Sullivan's own perceptions of the effect of that joint representation would have impacted whether he would tell a conflicted lawyer the truth."

PRP Brief at 19. "It is not known" meets no burden. (And it is telling that despite all the pages devoted to taking his defenders to task for refusing to produce Mr. Sullivan at trial, the petitioner does not rectify this error by producing an affidavit from Sullivan for this personal restraint petition.)

The petitioner creates similar narratives about how people might have performed differently and attempts to link them to conflicts. These are not the first exercises in narrative speculation to have reached the courts in personal restraint petitions. See this selection from the Supreme Court's rejection of a similar hypothetical, which was intended to show deficiency of representation:

> [Petitioner] contends: "In this case, defense counsel knew that many family members were not forthcoming about Davis'[s] problems growing up but his aunts were prepared to talk about them. That knowledge should have motivated Davis'[s] attorneys to jump on the opportunity to bring the aunts' memories to the jury as a top priority. Potentially, if other family members had seen or heard the aunts' recollections, they might have been more willing to come forward with more information from Davis'[s] troubled past." Am. Pet. at 27.
>
> This is entirely too speculative to meet his burden of showing that but for counsel's deficient performance, there is a 'reasonable probability' that the outcome would have been different."

In re Pers. Restraint of Davis, 188 Wn.2d 356, 374, 395 P.3d 998, 1007 (2017) (citations omitted.

The State suggests that speculation surmounts no burden of proof or production. To link a claimed error with a way the petitioner thinks the trial should or could have gone better is not the same as showing that the one would have caused the other.

IV. Judicial Recusal

Case law is clear that one cannot be a defendant's attorney and judge at the same time. E.g., In re: Michaels, 150 Wn.2d 159, 75 P.3d 950 (2003). However, in this case, the petitioner's objection is not so clear cut. Petitioner accuses Judge Evans, not of being his lawyer, but rather being the lawyer of another witness in the case, Otis Pippen. Or, rather, petitioner accuses Judge Evans, not of being this other witness's lawyer, but of having been his lawyer once, in another case years ago. Petitioner candidly admits that all law in the state is to the effect that this is not grounds for recusal. The law is aptly summarized in a Division 3 case:

> Due process, the appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) also require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned. In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); State v. Madry, 8 Wn.App. 61, 68-70, 504 P.2d 1156 (1972). A party claiming bias or prejudice must, however, support the claim; prejudice is not presumed as it is under RCW 4.12.050. Evidence of a judge's actual or potential bias is required before the appearance of fairness doctrine will be applied. State v. Post, 118 Wn.2d 596, 618-19, 826 P.2d 172 & n.9, modified, 837 P.2d 599 (1992); State v. Carter, 77 Wn.App. 8, 11-12, 888 P.2d 1230, review denied, 126 Wn.2d 1026, 896 P.2d 64 (1995); State v. Bilal, 77 Wn.App. 720, 722, 893 P.2d 674, review denied, 127 Wn.2d 1013, 902 P.2d 163 (1995).

State v. Dominguez, 81 Wn.App. 325, 328-29, 914 P.2d 141, 144 (1996).

The state has found no published case in which a Washington court of appeals has dignified the notion that a judge must recuse if that judge has previously represented any witness in a case. Despite the petitioner's

suggestion that current case law is dusty and obsolete, the idea of judicial recusal based on something other than prior representation of a party is dismissed out of hand by Div. III in a 2018 unpublished decision (made more than a year after the petitioner suggests our law changed). In re Marriage of Miller, No. 35143-2-III, 2018 Wn.App LEXIS 1585, at 10 (Ct. App. July 10, 2018), Exhibit 5.

The petitioner feints in the direction of there being new case law from the Supreme Court of the United States that changes our state's standards, claiming that our cases "may no longer be viable in light of a series of cases over the past decade where the U.S. Supreme Court clarified that recusal is required even if there is no allegation of a personal bias in a particular case." Brief, 29-30. But the cases cited clarify nothing; they repeat the test that all states use. The petitioner hails Rippo v. Baker, 137 S. Ct. 905, 907 (2017), for creating a new objective standard – but what the court says in so many words that it is doing is reiterating the test set forth in a 43 year old case, Withrow v. Larkin, 421 U. S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). Rippo, 137 S.Ct. at 907. The reason the Supreme Court discussed an objective standard in Rippo at all was because, against all sensible jurisprudence from Larkin to the present, the court it reversed had based a recusal decision solely on whether the trial judge was actually biased – a purely subjective standard rather than the decades-established mixed standard –without reference to the appearance of fairness, which has never been the law in or outside the state of Washington. Rippo, 137 S.Ct.

at 907. The court in Rippo neither established nor intended to establish a new standard for judicial recusal.

Nor has this division made any adjustments in what it perceives the law to be since the Rippo decision. It cited to Dominguez a month after the Rippo decision. Neravetla v. Dep't of Health, 198 Wn.App 647, 670, 394 P.3d 1028, 1041 (2017). Div. I uses Dominguez as its exemplar of current law in this area in an unpublished case as current as this January: In re Dependency of S.R.P.W., Nos. 78195-2-I, 78196-1-I, 78197-9-I, 2019 Wn.App LEXIS 61, at 17 (Ct. App. Jan. 14, 2019), reproduced herein as Exhibit 6.

Petitioner admits the decades-established law of the State of Washington would not recuse the trial judge in this case, who represented a witness in the case once many years ago. Petitioner then fails to prove the law has changed, and gives no policy reason why it should have changed. The petitioner lists the actions taken by the judge in the case and calls those actions evidence of bias without any real argument to that effect – saying the court ruled in a motion and must have been biased in doing so because how could he not be (e.g, p. 32) – but a list followed by a conclusion is not an argument. Absent any information other than what the petitioner has given us, there is no objective reason to believe the trial judge had any bias; nor is any party alleging that the judge was actually biased. The petitioner having failed in his duty to show such evidence, this claim must fail.

V. "True Threat" Instruction

The petitioner equates the crime of solicitation of murder with harassment and making a bomb threat, which either require, or (in the case of bomb threats) the petitioner thinks should require, a "true threat" jury instruction. There is one obvious distinction between solicitation and these other crimes that we should keep in mind at the outset. If a person threatens someone that person does not intend to harm, there is little risk of harm to the person threatened. If a person threatens a bomb explosion but has not actually prepared a bomb, there is little risk of harm to those threatened. If a person promises money to a cellmate in exchange for the murder of a third party, it is not the level of seriousness of the promisor that determines whether the target will be murdered. The act of solicitation is not a threat, it is the instrumentality of the harm to come.

But the real issue here is this: the petitioner never explains why he could not argue his theory of the case.

The petitioner explicitly recognizes that state law is against him and that he alleges a U.S. First Amendment constitutional violation. Brief, 36-37. His argument is that the instructions given were insufficient, and that his theory of the case was that he did not subjectively mean the things he said. Brief, 33. But he encloses the jury instruction in his case – p. 69 of PRP exhibits, instruction #26 – and admits it tracks statutory language. Brief, 35. The instruction complained of is:

> A person commits the crime of criminal solicitation to commit murder in the first degree when, with intent to promote or facilitate the commission of a crime of murder

> in the first degree, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

Instruction 26, supra.

Jury instructions are sufficient if they allow the defendant to argue his theory of the case. State v. Henderson, 192 Wn.2d 508, 514, 430 P.3d 637, 640 (2018). The theory of the defense in this case, according to the petitioner himself, is that he spoke without the intent to promote or facilitate the commission of murder in the first degree. But if the jury believed that was a reasonable possibility, it could not have convicted the petitioner under these instructions.

To prevail on this claim, the petitioner must prove both constitutional error and, by preponderance, that the outcome of the case would have been different if there had been no error. State v. Buckman, 190 Wn.2d 51, 60, 409 P.3d 193, 199 (2018). Criminal solicitation has a statutory subjective element requiring the solicitor to intend to "promote or facilitate" the crime solicited. RCW 9A.28.030(1). The crimes of harassment and of making a bomb threat have no statutory subjective element. RCW 9A.46.020(1), RCW 9.61.160(1). The petitioner's attempt to draw an equivalency between them is unconvincing. The problems the courts that read subjective elements into the threat statutes were trying to stem have already been adequately addressed by the solicitation statute as it stands. So the petitioner has failed to prove a constitutional violation.

Much less has he proved prejudice, since he was able to forcefully argue his theory of the case. The jury had the option, after listening to the defendant's own voice, to determine whether he really intended to murder people he believed were witnesses against him, and to acquit on that basis. The fact that they did not is attributable to the fact that he came across more truthful when he was soliciting murder than he did when he was proclaiming his innocence.

VI. "Tying Up"

The petitioner takes the State to task for cross-examining the defendant regarding the payments he made to the people he later tried to kill for betraying him.

He says the State should have tied up testimony on the following issues because there was no support for them in the record other than the assumptions inherent in questions by the prosecuting attorney:

- that he paid Ms. Crimmins $8000,
- that Mr. Walker had bought a truck with the money,
- that Crimmins would be a witness,
- that Crimmins had failed to appear.

Brief, 38.

This is not entirely the case. We have direct evidence of the following:

- That the petitioner paid Ms. Crimmins and Mr. Walker.
- That they bought a white truck with the money.
- That the money was paid on condition they accept responsibility for his crimes.
- That they did not do so, and he was homicidally enraged as a result.

RP 606.

What remains "united" are two questions from the state: the one asking about the specific amount of $8,000; and the one assuming that the defendant was aware his attorney put Ms. Crimmins on his witness list. Brief, 38. These two facts, not the entire constellation of facts pointing to the defendant's motive to murder Ms. Crimmins and the others, are at issue in this section.

Although "[a] prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable,'" State v. Babich, 68 Wn.App. 438, 444, 842 P.2d 1053 (1993), "[d]eciding if the questions are inappropriate requires examining whether the focus of the questioning is to impart evidence within the prosecutor's personal knowledge without the prosecutor formally testifying as a witness." State v. Lopez, 95 Wn.App. 842, 855, 980 P.2d 224, 231 (1999), citing 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE, § 258 at 125 (3d ed. Supp. 1998-1999). So the first thing the petitioner must do to shoulder his burden is show that the prosecutor intended, as the "focus" of the questions he asked, to impart evidence through questioning – that this was not a slip or an assumption, not an error or omission, but an intentional episode of testimony from the state. The petitioner has not made any effort to do this, and therefore fails to establish error at all.

Nor could petitioner prove any error was harmful. "Error is harmless unless the improper cross-examination was sufficient to affect the

outcome of the trial." State v. Smith, 67 Wn.App. 838, 846, 841 P.2d 76 (1992); accord, Lopez, supra, 95 Wn.App. at 856. This is why it is important to note that the fact that the petitioner paid for a "fall guy" and was betrayed was independently established, and only details are at issue.

It is also important to note again that the actual homicide plot, and therefore the meat of the case, was confirmed by an audio recording of one of the petitioner's conversations on the subject. In Lopez, supra, the information inherent in the question was that the school-age victim of the defendant's sexual abuse had not informed teachers that such abuse occurred; the Court of Appeals noted, "It was not that helpful to Mr. Lopez's case that the teachers testified S.L. had not told them anything about the abuse." Lopez, 95 Wn.App. at 856. The fact that the jury already knew the defendant had been betrayed after giving his victims enough money to buy a truck was already in the record, given the price of trucks today, implies a greater betrayal than merely $8,000 – the State's assumption that the cost was so little was actually helpful to Knox in that it reduced the financial sting that was part of the State's case for motive.

Also contrast with the defense's cited case of State v. Miles, 139 Wn.App. 879, 162 P.3d 1169 (2007). There, the defendant, a professional boxer, claimed an alibi defense: that he was 100% disabled and required 24 hour care just to live, thus could not have gone on the streets to sell drugs. The State had no information to contradict this, but "the prosecutor did more than merely inquire if Miles had boxed since his injury. His questions implied that Miles had boxed in specific matches, on specific days, at

specific locations, with specific results. He questioned Bell as if he had details of two specific fights Miles had participated in. And he questioned Miles as if he was reading from a profile of a boxer, asking Miles if the profile fit him, and as if he had the records of nine fights that Miles participated in after 2001." Miles, supra, 139 Wn.App. at 887. The prosecutor was not supplementing information already known with details – the entire story came through the mouth of the prosecutor by way of detailed and specific questions repeated throughout cross-examination. This is not that case. Here, the information the defendant was betrayed and vengeful was already proved. The law already anticipates that occasionally a party may refer to information that will not make it into the official record, which is why standard jury instructions are prepared for the eventuality – see argument infra.

"Where the defendant fails to object to an improper comment, the error is waived "unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). No objection was made here. Nor could any good have come from insisting that the information the prosecutor assumed in his question be proved. Better to allow it to continue as an assumption than require that it be proved. After all, "a jury is presumed to follow the trial court's instructions." State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487, 496 (1995). Jury instruction #1, PRP p. 42, instructed the

jury to disregard all evidence other than that "from witnesses, stipulations, and the exhibits." So the jury should not have considered any statements of counsel as evidence anyway. Objecting and requiring the state to prove the information could have interfered with that by highlighting its importance and reinforcing it in the minds of the jury. This is why the decision whether to object is considered a classic trial tactic and is not even subject to traditional "ineffective assistance of counsel" objections. State v. Strange, 188 Wn.App. 679, 688, 354 P.3d 917, 922 (2015). The defendant could not, even on direct appeal, have established he suffered harm from, or even that he did not deliberately accept, the error of which he accuses the State – far less does he establish he is entitled to the more dearly held relief available in a personal restraint petition.

VII. Sufficiency of Evidence of Intent to Deliver

At the outset, the State notes that insofar as this section of petitioner's brief is actually an argument regarding corpus delicti, it is not cognizable here. The defense never objected at trial to the admission of the petitioner's confession that he is a drug dealer (or, for that matter, his admission he needed guns to protect himself due to the dangerous nature of his business).

"The corpus delicti rule is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant must make proper objection to the trial court to preserve the issue." State v. Dodgen, 81 Wn.App 487, 492, 915 P.2d 531, 534 (1996). "[F]ailure to object precludes appellate review because "it may well be that 'proof of the

corpus delicti was available and at hand during the trial, but that in the absence of [a] specific objection calling for such proof it was omitted.'" State v. C.D.W., 76 Wn.App. 761, 763-64, 887 P.2d 911 (1995) (quoting People v. Wright, 52 Cal. 3d 367, 404, 802 P.2d 221, 245, 276 Cal. Rptr. 731 (1990), cert. denied, 502 U.S. 834, 112 S. Ct. 113, 116 L. Ed. 2d 82 (1991)). See also State v. Grogan, 147 Wn.App 511, 519, 195 P.3d 1017, 1022 (2008) ("the corpus delicti rule is purely a rule of evidence, it cannot be raised for the first time on appeal.")

This is doubtless the reason the petitioner does not designate the corpus delicti issue as an error in this personal restraint petition. The State also notes that the issue was not raised on direct appeal. For all these reasons, we determine whether evidence was sufficient using the petitioner's incriminating statements along with all other items of evidence admitted at trial. E.g., State v. Grogan, 158 Wn.App 272, 246 P.3d 196, 198 (2010).

"Evidence is sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995)." State v. Campos, 100 Wn.App 218, 222, 998 P.2d 893, 895 (2000). The Campos court went on to specifically address the intent to deliver a controlled substance: "The intent to deliver must logically follow as a matter of probability from the evidence." Id.

But the most important part of this is the fact that, as with warrants, challenges to the sufficiency of the evidence take all evidence in the light most favorable to the State. Green, supra, 94 Wn.2d at 221. The petitioner claims his baggies might have been for kitchen use, his large number of cell phones might have been for innocent use, his kitchen scale might have been used for food, his meth pipe might mean that he intended all of the methamphetamine found on his property to be ingested by himself (though he described himself as just an occasional user at RP 758). Brief, 43. (The petitioner does not even try to explain what innocent explanation he could have for describing himself to the police as a drug dealer.) He also claims without any explanation at all that the amount of cash he had on his person when he was arrested – $2,405 – is "modest." Brief, 43. But compare that amount with the $324 considered sufficient, along with 24 rocks of crack, to prove intent to sell in State v. Hagler, 74 Wn.App. 232, 235, 872 P.2d 85 (1994).

The issue with all these claims is that claims is all they are. As the Campos court cogently noted when its appellant made similar arguments: "[A]lthough Mr. Campos attempted to offset the State's evidence with innocent explanations, the jury resolved the factual issues in favor of the State. The jury resolves contradictory evidence by making credibility determinations. We do not redecide credibility determinations." Campos, 100 Wn.App at 224. Note also that the quantum of evidence (even setting to the side, as we do not, the petitioner's admission) was no greater in Campos than here: the defendant in that case was convicted and sufficiency upheld

where he denied he was a drug dealer but had drugs, cash, a pager, a charger, and a cryptic list that might have been a ledger. Campos, 100 Wn.App. at 224.

The evidence of possession with intent in this case is so overwhelming that the petitioner's own defense at trial was not that there was no proof of intent to sell, but rather that someone else was the drug dealer. E.g., RP 1011 (granting that evidence the petitioner had touched the scales would have been damaging; pointing the finger at Christian Sullivan). Although unavailing, it was sensible under the circumstances, because the evidence that someone intended to sell drugs was more than sufficient.

VIII. Ineffective Assistance and Cumulative Error

The petitioner carries on the legal tradition of recasting each substantive legal claim as an ineffective assistance of counsel claim and closing with an appeal to cumulative error.

> Where a defendant claims ineffective assistance of counsel for his trial counsel's failure to object, he must also prove that the decision not to object was not a legitimate trial tactic. State v. Hendrickson, 129 Wn.2d 61, 79-80, 917 P.2d 563 (1996). "If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel." State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). We apply a strong presumption that trial counsel rendered adequate assistance and "made all significant decisions in the exercise of reasonably professional judgment," and the reasonableness of counsel's performance must be performed in view of all of the facts and circumstances of the case. Lord, 117 Wn.2d at 883. In particular, "[t]he decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel." State v. Kolesnik, 146 Wn.App. 790, 801, 192 P.3d 937 (2008).

State v. Strange, 188 Wn.App. 679, 688, 354 P.3d 917, 921-22 (2015).

The petitioner takes his trial counsel to task for making various decisions that, while rational, did not result in victory. Even assuming they were as available as the petitioner advertises – perhaps, especially presuming that – it still makes sense not to call as defense witnesses people like Crimmins and Sullivan who the defendant will be accusing of committing crimes and who, in Crimmins's case, the defendant is accused of trying to murder. These people are unlikely to be helpful. It is worth noting at this point that the defense's plan had a decent success rate: the petitioner was only convicted of one out of three counts of solicitation to commit murder.

The State has already noted that the petitioner's attempts to locate connections between the defendant, the lawyers on the case, and the witnesses only resulted in the discovery that in the large group of people involved in the case, some had encountered others previously. This did not establish either conflict or prejudice. The petitioner never even tried to do so other than by pointing out the connections and speculating about how the connections might have affected things. Contrast these alternate-history narratives with what the court in Regan, supra, considered a real conflict: the defendant in that case was faced with a choice between two bad alternatives (lack of an attorney at a critical stage of the proceeding versus an unwanted continuance), one of which was actually – not potentially, but

absolutely – going to happen. That is how to prove harm. But here, neither prejudice nor conflict has been established.

Nor is there cumulative error. The state does not concede that it is in any way error for a judge or prosecutor or defense attorney to have represented someone in the past who is involved in a current case, and most of the petitioner's sections on this subject are devoted to finding such connections and then announcing that a conflict existed, either without more or else with a hypothetical narrative about how people might have done different if they had known. But these are not conflicts. Neither the defense attorneys, nor the prosecutors, nor the judge had real conflicts of interest in this case. The petitioner was not entitled to a true threat instruction. The petitioner had the opportunity to object to the prosecutor's questions about the money he spent futilely to find someone to "take the fall" for him and received the benefit of counsel's choice not to object; and his attorney was far from deficient and secured his acquittal on several felony counts.

Look at the way the chips fell at trial. When officers testified, the jury believed them. Thus, the drug and gun cases resulted in conviction. When Haley Crookshanks testified against him and no officer backed up her testimony, the jury found reasonable doubt and acquitted Knox. When the jury had the opportunity to hear Knox's voice, it convicted Knox of soliciting the murder of "Bulldog" Walker. But the two charged solicitations that were not recorded – the ones the jury would have had to take on Otis Pippen's word – resulted in acquittals.

Knox says he would have been able to counter Pippen's and Crookshanks's testimony, were it not for the conflicts he imagines. But he had already countered them effectively. The verdicts tell us that the jury was not prepared to believe the unsupported word of anyone but a police officer – and that the only words from the petitioner they were prepared to credit were those recounted by the police or that they heard in candid recordings.

The credibility contest that Knox lost was not the contest between his own word and the word of those who testified against him – it was the contest of his own words out of court, talking to the police and to Pippen, versus his own testimony at trial. Knox himself was the only person the jury believed in the entire courtroom who was not testifying from behind a badge – but it was the out-of-court Knox who was credible, not the version of himself he had hoped to present.

E. CONCLUSION

In the Internet age, it is increasingly easy to find previous connections, even at the second or third degree, between people. In the law enforcement community, such connections are bound to be even more common than they are among the general public. But the pointing out of a connection is not the same as proof of a conflict of interest, far less of actual detriment.

But the greatest error Mr. Knox makes in his petition is characterizing himself as having been convicted because the jury found Otis Pippen credible when it should not have. The two counts the jury would

have had to trust Otis Pippen to convict him of resulted in acquittals. The murder solicitation he was convicted of was the one he was recorded acknowledging. And the drug and gun charges were based on crimes he admitted committing. The star witness against the petitioner was the petitioner himself.

Respectfully submitted this 10th day of May, 2019.

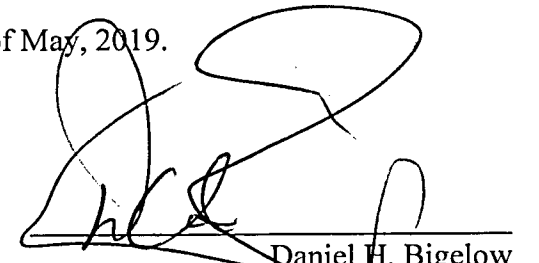

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EXHIBIT 1

FILED
SUPERIOR COURT

2015 DEC 24 P 12: 17

COWLITZ COUNTY
STACI L. MYKLEBUST, CLERK

BY: _____

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON, Plaintiff, vs. BRADLEY DAVID KNOX Defendant. DOB: 9/10/1955 PCN: SID: WA11492524	No. 14-1-01283-4 **Felony Judgment and Sentence -- Prison (FJS)** ☒ **Clerk's Action Required, para 2.1, 4.1, 4.3, 4.8 5.2, 5.3, 5.5 and 5.7** ☐ **Defendant Used Motor Vehicle**

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I. Hearing

1.1 The court conducted a sentencing hearing this date 12/22/15; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon

MHE ☐ guilty plea (date) _____ ☒ jury-verdict (date) 10/21/15 ☐ bench trial (date) _____:

Count	*Crime*	*RCW (w/subsection)*	*Class*	*Date of Crime*
III	SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE	9A.28.030, 9A.32.030	FA	09/28/14-10/22/14

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)

☐ Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

☐ The **burglary** in Count _____ involved theft or intended theft.

GV☐ For the crime(s) charged in Count _____, **domestic violence** was pled and proved. RCW 10.99.020.

☐ The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.

☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____. RCW 9.94A.825, 9.94A.533.

☐ Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center

EXHIBIT NO 1-A

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designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

☐ In count _____ the defendant committed a robbery of a pharmacy as defined in RCW 18.64.011(21), RCW 9.94A.____.

☐ The offense in Count _____ was committed **in a county jail or state correctional facility.** RCW 9.94A.535(5).

☐ The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

☐ Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.

☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.829.

☐ The defendant committed ☐ **vehicular homicide** ☐ **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.

☐ In Count _____, the defendant had (number of) _____ **passenger(s) under the age of 16** in the vehicle. RCW 9.94A.533.

☐ Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.

☐ In Count _____ the defendant has been convicted of **assaulting a law enforcement officer** or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault, as provided under RCW 9A.36.031, and the defendant intentionally committed the assault with what appeared to be a firearm. RCW 9.94A.831, 9.94A.533.

☐ Count _____ is a felony in the commission of which the defendant used a **motor vehicle.** RCW46.20.285.

☐ The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

☐ In Count _____, assault in the 1st degree (RCW 9A.36.011) or assault of a child in the 1st degree (RCW 9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be subject to a mandatory minimum term of 5 years (RCW 9.94A.540).

☐ Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.

☒ **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	*Cause Number*	*Court (county & state)*	*DV* Yes*
1.	VUCSA DELIVERY – METHAMPHETAMINE – SCHOOL ZONE / FIREARM ENH. X2	14-1-00095-0	COWLITZ CO., WA	
2.	UNL POSSESSION OF A FIREARM IN THE FIRST DEGREE * same criminal conduct	14-1-00095-0	COWLITZ CO., WA	
3.	UNL POSSESSION OF A FIREARM IN THE FIRST DEGREE * same criminal conduct	14-1-00095-0	COWLITZ CO., WA	
4.	BAIL JUMPING	14-1-00095-0	COWLITZ CO., WA	

* DV: Domestic Violence was pled and proved.

☐ Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime	DV* Yes
1	SEE APPX 2.2						
2							
3							
4							
5							

* DV: Domestic Violence was pled and proved.

☒ Additional criminal history is attached in Appendix 2.2.

☐ The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

☒ The prior convictions listed as number(s) 4 AND 5, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

☐ The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
III	8	XV	277.5-369.75M		277.5-369.75M	20 YEARS TO LIFE

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12), (P16) Passenger(s) under age 16.

☐ Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are ☐ attached ☐ as follows: _____.

2.4 ☐ **Exceptional Sentence.** The court finds substantial and compelling reasons that justify an exceptional sentence:

☐ below the standard range for Count(s) _____.

☐ above the standard range for Count(s) _____.

SUPERIOR COURT OF WASHINGTON COUNTY OF COWLITZ

STATE OF WASHINGTON, Plaintiff, v. BRADLEY D. KNOX, Defendant.	PROSECUTOR'S STATEMENT OF DEFENDANT'S CRIMINAL HISTORY AMENDED

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME V, SV,SO
VUCSA – DEL MARIJ (WASHES)	10/18/79	SPOKANE CO., WA	05/12/79	A	
BURG 2	07/02/96	CLARK CO., WA 96-1-00756-1	10/26/95	A	
TAMPERING WITH A WITNESS (02/13/99 ASSAULT 4 990063 CLARK CO. DISTRICT COURT)	07/02/96	CLARK CO., WA 96-1-00756-1	01/01/96	A	
CONSPIRACY – VUCSA MANUF METH – PROTECTED ZONE (91 MO PRISON)	11/25/03	CLARK CO., WA 03-1-00055-8	07/07/03	A	
VUCSA –POSS OF EPHEDRINE OR PSUEDOEPHEDRINE W/INT MANUF METH (REL PRISON 01/26/10)	11/25/03	CLARK CO., WA 03-1-00055-8	07/07/03	A	
VUCSA – DEL METH	09/16/05	WASHINGTON CO., OR C051925CR	06/17/05	A	
VUCSA – POSS METH (18 MO PRISON)	09/16/05	WASHINGTON CO., OR C051925CR	06/17/05	A	

PEND: 13-1-01363-8 VUCSA POSS HEROIN
POSS METH
DWLS 1
BAIL JUMPING

PEND: 14-1-01040-8 UNLAWFUL IMPRISONMENT /DWLS 1

*PRIOR CONVICTIONS COUNTED AS ONE OFFENSE IN DETERMINING THE OFFENDER SCORE RCW 9.94A.360(11).

☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

☐ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☐ found by jury, by special interrogatory.

☐ within the standard range for Count(s) _____, but served consecutively to Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____.

☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

☐ (Name of agency) _____ 's costs for its emergency response are reasonble. RCW 38.52.430 (effective August 1, 2012).

2.6 ☐ Felony Firearm Offender Registration. The defendant committed a felony firearm offense as defined in RCW 9.41.010.

☐ The court considered the following factors:

☐ the defendant's criminal history.

☐ whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

☐ evidence of the defendant's propensity for violence that would likely endanger persons.

☐ other:_____.

☐ The court decided the defendant ☐ should ☐ should not register as a felony firearm offender.

III. Judgment

3.1 The defendant is ***guilty*** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☒ The court finds the defendant *NOT GUILTY* in Counts I AND II in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) ***Confinement.*** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

300 months on Count I _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

☐ The confinement time on Count(s)_____ contain(s) a mandatory minimum term of _____.

☐ The confinement time on Count _____ includes _____ months as enhancement for ☐ firearm ☐ deadly weapon ☐ VUCSA in a protected zone ☐ manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: 300 months.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: Sentence enhancements in Cowlitz County 14-1-00095-0.

This sentence shall run concurrently with the sentence in the following cause number(s) (see RCW 9.94A.589(3)): COWLITZ COUNTY CASE 14-1-00095-0.

Confinement shall commence immediately unless otherwise set forth here:_____.

(b) *Credit for Time Served.* The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for:

Count(s) I 36 months for Serious Violent Offenses
Count(s) _____ 18 months for Violent Offenses
Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

☐ consume no alcohol or marijuana.
☐ have no contact with: _____.
☐ remain ☐ within ☐ outside of a specified geographical boundary, to wit:
_____.
☐ not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.
☐ participate in the following crime-related treatment or counseling services:
_____.
☐ undergo an evaluation for treatment for ☐ domestic violence ☐ substance abuse ☐ mental health ☐ anger management, and fully comply with all recommended treatment.
☐ comply with the following crime-related prohibitions:_____
_____
_____.
☐ Other conditions:
_____
_____
_____
_____.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE			
PCV	$ 500.00	Victim assessment	RCW 7.68.035
PDV	$	Domestic Violence assessment	RCW 10.99.080
CRC	$	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee $ FRC	
		Witness costs $ WFR	
		Sheriff service fees $ SFR/SFS/SFW/WRF	
		Jury demand fee $ JFR	
		Extradition costs $ EXT	
		Incarceration Fee $ JLR	
		Other $	
PUB	$	Fees for court appointed attorney	RCW 9.94A.760
WFR	$	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	$	Fine RCW 9A.20.021; ☐ VUCSA chapter 69.50 RCW, ☐ VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	$	Drug enforcement fund of Cowlitz County Prosecutor.	RCW 9.94A.760
	$	DUI fines, fees and assessments	
CLF	$	Crime lab fee ☐ suspended due to indigency	RCW 43.43.690
	$ 100.00	DNA collection fee	RCW 43.43.7541
FPV	$	Specialized forest products	RCW 76.48.140
MTH	$	Meth/Amphetamine Clean-up fine $3000. 69.50.401(a)(1)(ii).	RCW 69.50.440,
	$	Other fines or costs for:	
DEF	$	Emergency response costs ($1000 maximum, $2,500 max. effective Aug. 1, 2012.) RCW 38.52.430 Agency:	
	$ -0-	Restitution to:	
RTN/RJN	$	Restitution to:	
	$	Restitution to: (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
	$ 1600-	***Total***	RCW 9.94A.760

☐ The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

☐ shall be set by the prosecutor.

☐ is scheduled for _____ (date).

☐ The defendant waives any right to be present at any restitution hearing (sign initials): _____.

☐ Restitution ordered above shall be paid jointly and severally with:

Name of other defendant	*Cause Number*	(Amount-$)
RJN		

☐ The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

☒ All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $ 25.00 per month commencing_____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

☐ The court orders the defendant to pay costs of incarceration at the rate of $_____ per day, (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

☐ ***HIV Testing.*** The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

☒ The defendant shall not have contact with STEVEN E. WALKER (11-24-1975) (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until DECEMBER 24, 2035 (which does not exceed the maximum statutory sentence).

☒ The defendant is excluded or prohibited from coming within 100 YARDS (distance) of:
☒ STEVEN E. WALKER (name of protected person(s))'s
☒ home/ residence ☒ work place ☒ school ☐ (other location(s)) _____
_____, or
☐ other location: _____,
until DECEMBER 24, 2035 (which does not exceed the maximum statutory sentence).

☒ A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Stalking No-Contact Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____
_____
_____
_____

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections:_____
_____.

4.8 Forfeiture: The Court hereby forfeits these items: _____ to _____ a law enforcement agency.

4.9 Exoneration: The Court hereby exonerates any bail, bond and/or personal recognizance conditions.

V. Notices and Signatures

5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). **You are required to contact the Cowlitz County Collections Deputy, 312 SW First Avenue, Kelso, WA 98626, (360) 414-5532 with any change in address or employment or as directed. Failure to make the required payments or advise of any change in circumstances is aviolation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 days in jail.** The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **Community Custody Violation.**
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5a **Firearms. You may not own, use or possess any firearm, and under federal law any firearm or ammunition,** unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. **You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.5b ☐ **Felony Firearm Offender Registration.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Reserved

5.7 ☐ **Department of Licensing Notice:** The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. **Clerk's Action**–The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.285. **Findings for DUI, Physical Control, Felony DUI or Physical Control, Vehicular Assault, or Vehicular Homicide (ACR information) (Check all that apply):**

☐ Within two hours after driving or being in physical control of a vehicle, the defendant had an alcohol concentration of breath or blood (BAC) of ____.
☐ No BAC test result.
☐ BAC Refused. The defendant refused to take a test offered pursuant to RCW 46.20.308.
☐ Drug Related. The defendant was under the influence of or affected by any drug.
☐ THC level was_____ within two hours after driving.
☐ Passenger under age 16. The defendant committed the offense while a passenger under the age of sixteen was in the vehicle.

Vehicle Info.: ☐ Commercial Veh. ☐ 16 Passenger Veh. ☐ Hazmat Veh.

5.8 IF AN APPEAL IS PROPERLY FILED AND APPEAL BOND POSTED, THE DEFENDANT WILL REPORT TO THE DEPARTMENT OF CORRECTIONS, WHO WILL MONITOR THE DEFENDANT DURING THE PENDENCY OF THE APPEAL, SUBJECT TO ANY CONDITIONS IMPOSED BY DOC AND/OR INCLUDED IN THIS JUDGMENT AND SENTENCE AND NOT SPECIFICALLY STAYED BY THE COURT.

5.9 FAILURE TO COMPLY WITH THE CONDITIONS OF THIS JUDGMENT & SENTENCE, INCLUDING ANY REPORTING CONDITIONS OR CONDITIONS OF COMMUNITY CUSTODY, MAY RESULT IN A FORFEITURE OF YOUR RIGHT TO APPEAL AND DISMISSAL OF ANY PENDING APPEAL OR COLLATERAL ATTACK.

5.10 Other: _____.

Done in Open Court and in the presence of the defendant this date: 12-24-2015.

Judge/Print Name: EVANS

Deputy Prosecuting Attorney
WSBA No. 36804
Print Name: SEAN BRITTAIN

Attorney for Defendant
WSBA No. 14179
Print Name: SIMMIE BAER

Defendant
Print Name: BRADLEY DAVID KNOX

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: Brad Kay

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) _____, (state) _____, on (date) _____.

_____ _____

Interpreter Print Name

VI. Identification of the Defendant

SID No. WA11492524
(If no SID complete a separate Applicant card (form FD-258) for State Patrol)

Date of Birth: 9/10/1955

FBI No.: 428045P6

Local ID No. _____

PCN No. _____

Other _____

Alias name, DOB: _____

Race:			**Ethnicity:**	**Sex:**
☐ Asian/Pacific Islander	☐ Black/African-American	☒ Caucasian	☐ Hispanic	☒ Male
☐ Native American	☐ Other: _____		☒ Non-Hispanic	☐ Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk. Janette Weiri Dated: 12/24/15

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date:

_____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk.

The defendant's signature: Brad Kurt

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

FILED
SUPERIOR COURT

2015 DEC 24 P 12: 17

COWLITZ COUNTY
STACI L. MYKLEBUST. CLERK
BY:

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON, Plaintiff, vs. BRADLEY DAVID KNOX Defendant. DOB: 9/10/1955 PCN: SID: WA11492524	No. 14-1-00095-0 **Felony Judgment and Sentence -- Prison (FJS)** ☒ **Clerk's Action Required, para 2.1, 4.1, 4.3, 4.8 5.2, 5.3, 5.5 and 5.7** ☐ **Defendant Used Motor Vehicle**

15 9 02052 4

I. Hearing

1.1 The court conducted a sentencing hearing this date 12/22/15; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

MHE

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon ☐ guilty plea (date) _____ ☒ jury-verdict (date) 10/21/15 ☐ bench trial (date) _____:

Count	*Crime*	*RCW (w/subsection)*	*Class*	*Date of Crime*
I	VUCSA DELIVER – METHAMPHETAMINE – SCHOOL BUS STOP WITH FIREARM ENHANCEMENTS X2	69.50.401(1), 69.50.401(2)(b), 69.50.435(1)(c), 9.94A.533(3), 9.94A.533(3)	FB	01/17/14
II	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE	9.41.040(1)(a)	FB	01/17/14
III	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE	9.41.040(1)(a)	FB	01/17/15
IV	BAIL JUMPING	9A.76.170(1)	FC	05/05/14

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)

☐ Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

☐ The **burglary** in Count _____ involved theft or intended theft.

GV☐ For the crime(s) charged in Count _____, **domestic violence** was pled and proved. RCW 10.99.020.

EXHIBIT NO 1-B

91 112

☒ The defendant used a **firearm** in the commission of the offense in Count I. RCW 9.94A.825, 9.94A.533.

☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____. RCW 9.94A.825, 9.94A.533.

☒ Count I, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

☐ In count _____ the defendant committed a robbery of a pharmacy as defined in RCW 18.64.011(21), RCW 9.94A.____.

☐ The offense in Count _____ was committed **in a county jail or state correctional facility**. RCW 9.94A.535(5).

☐ The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

☐ Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.

☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.829.

☐ The defendant committed ☐ **vehicular homicide** ☐ **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.

☐ In Count _____, the defendant had (number of) _____ **passenger(s) under the age of 16** in the vehicle. RCW 9.94A.533.

☐ Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.

☐ In Count _____ the defendant has been convicted of **assaulting a law enforcement officer** or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault, as provided under RCW 9A.36.031, and the defendant intentionally committed the assault with what appeared to be a firearm. RCW 9.94A.831, 9.94A.533.

☐ Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW46.20.285.

☒ The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

☐ In Count _____, assault in the 1st degree (RCW 9A.36.011) or assault of a child in the 1st degree (RCW 9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be subject to a mandatory minimum term of 5 years (RCW 9.94A.540).

☒ Counts II + III encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.

☒ **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	*Cause Number*	*Court (county & state)*	*DV* Yes*
1.	SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE	14-1-01283-4	COWLITZ CO., WA	
2.				

* DV: Domestic Violence was pled and proved.

☐ Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime	DV* Yes
1	SEE APPX 2.2						
2							
3							
4							
5							

* DV: Domestic Violence was pled and proved.

☒ Additional criminal history is attached in Appendix 2.2.

☐ The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

☒ The prior convictions listed as number(s) 4 AND 5, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

☐ The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
I	8	II	60+-120	36M 36M 24M	156-216M	10 YEARS
II	7	VII	67-89M		67-89M	10 YEARS
III	7	VII	67-89M		67-89M	10 YEARS
IV	8	III	43-57M		43-57M	5 YEARS

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12), (P16) Passenger(s) under age 16.

☐ Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are ☐ attached ☐ as follows: _____.

SUPERIOR COURT OF WASHINGTON COUNTY OF COWLITZ

STATE OF WASHINGTON, Plaintiff, v. BRADLEY D. KNOX, Defendant.	PROSECUTOR'S STATEMENT OF DEFENDANT'S CRIMINAL HISTORY **AMENDED**

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME V, SV,SO
VUCSA – DEL MARIJ (WASHES)	10/18/79	SPOKANE CO., WA	05/12/79	A	
BURG 2	07/02/96	CLARK CO., WA 96-1-00756-1	10/26/95	A	
TAMPERING WITH A WITNESS (02/13/99 ASSAULT 4 990063 CLARK CO. DISTRICT COURT)	07/02/96	CLARK CO., WA 96-1-00756-1	01/01/96	A	
CONSPIRACY – VUCSA MANUF METH – PROTECTED ZONE (91 MO PRISON)	11/25/03	CLARK CO., WA 03-1-00055-8	07/07/03	A	
VUCSA –POSS OF EPHEDRINE OR PSUEDOEPHEDRINE W/INT MANUF METH (REL PRISON 01/26/10)	11/25/03	CLARK CO., WA 03-1-00055-8	07/07/03	A	
VUCSA – DEL METH	09/16/05	WASHINGTON CO., OR C051925CR	06/17/05	A	
VUCSA – POSS METH (18 MO PRISON)	09/16/05	WASHINGTON CO., OR C051925CR	06/17/05	A	

PEND: 13-1-01363-8 VUCSA POSS HEROIN
POSS METH
DWLS 1
BAIL JUMPING

PEND: 14-1-01040-8 UNLAWFUL IMPRISONMENT /DWLS 1

*PRIOR CONVICTIONS COUNTED AS ONE OFFENSE IN DETERMINING THE OFFENDER SCORE RCW 9.94A.360(11).

2.4 ☐ **Exceptional Sentence.** The court finds substantial and compelling reasons that justify an exceptional sentence:
☐ below the standard range for Count(s) _____.
☐ above the standard range for Count(s) _____.
☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
☐ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☐ found by jury, by special interrogatory.
☐ within the standard range for Count(s) _____, but served consecutively to Count(s) _____.
Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

2.5 **Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:
☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):
_____.
☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.
☐ (Name of agency) _____ 's costs for its emergency response are reasonble. RCW 38.52.430 (effective August 1, 2012).

2.6 ☐ **Felony Firearm Offender Registration.** The defendant committed a felony firearm offense as defined in RCW 9.41.010.
☐ The court considered the following factors:
☐ the defendant's criminal history.
☐ whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.
☐ evidence of the defendant's propensity for violence that would likely endanger persons.
☐ other:_____.
☐ The court decided the defendant ☐ should ☐ should not register as a felony firearm offender.

III. Judgment

3.1 The defendant is ***guilty*** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☐ The court ***dismisses*** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 **Confinement.** The court sentences the defendant to total confinement as follows:
(a) ***Confinement.*** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

156 months on Count I — 50 months on Count IV
80 months on Count II — _____ months on Count _____
80 months on Count III — _____ months on Count _____

☐ The confinement time on Count(s)_____ contain(s) a mandatory minimum term of _____.

☒ The confinement time on Count I includes 96 months as enhancement for ☒ firearm ☐ deadly weapon ☒ VUCSA in a protected zone ☐ manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: 156 months.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:_____.

This sentence shall run concurrently with the sentence in the following cause number(s) (see RCW 9.94A.589(3)): COWLITZ COUNTY CASE 14-1-01283-4.

Confinement shall commence immediately unless otherwise set forth here:_____

_____.

(b) ***Credit for Time Served.*** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

4

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for:

Count(s) _____ 36 months for Serious Violent Offenses
Count(s) _____ 18 months for Violent Offenses
Count(s) I 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

☐ consume no alcohol or marijuana.
☐ have no contact with: _____.
☐ remain ☐ within ☐ outside of a specified geographical boundary, to wit:

_____.

☐ not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.
☐ participate in the following crime-related treatment or counseling services:

_____.

☒ undergo an evaluation for treatment for ☐ domestic violence ☒ substance abuse ☐ mental health ☐ anger management, and fully comply with all recommended treatment.
☐ comply with the following crime-related prohibitions:_____

_____

_____.

☐ Other conditions:

_____

_____

_____

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE			
PCV	$ 500.00	Victim assessment	RCW 7.68.035
PDV	$	Domestic Violence assessment	RCW 10.99.080
CRC	$	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee $ FRC	
		Witness costs $ WFR	
		Sheriff service fees $ SFR/SFS/SFW/WRF	
		Jury demand fee $ JFR	
		Extradition costs $ EXT	
		Incarceration Fee $ JLR	
		Other $	
PUB	$	Fees for court appointed attorney	RCW 9.94A.760
WFR	$	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	$	Fine RCW 9A.20.021; ☐ VUCSA chapter 69.50 RCW, ☐ VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	$	Drug enforcement fund of Cowlitz County Prosecutor.	RCW 9.94A.760
	$	DUI fines, fees and assessments	
CLF	$	Crime lab fee ☐ suspended due to indigency	RCW 43.43.690
	$ 100.00	DNA collection fee	RCW 43.43.7541
FPV	$	Specialized forest products	RCW 76.48.140
MTH	$	Meth/Amphetamine Clean-up fine $3000. 69.50.401(a)(1)(ii).	RCW 69.50.440,
	$	Other fines or costs for:	
DEF	$	Emergency response costs ($1000 maximum, $2,500 max. effective Aug. 1, 2012.) RCW 38.52.430 Agency:	
	$ -0-	Restitution to:	
RTN/RJN	$	Restitution to:	
	$	Restitution to: (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
	$ 1600	*Total*	RCW 9.94A.760

☐ The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

☐ shall be set by the prosecutor.

☐ is scheduled for _____ (date).

☐ The defendant waives any right to be present at any restitution hearing (sign initials):_____.
☐ Restitution ordered above shall be paid jointly and severally with:

Name of other defendant	*Cause Number*	(Amount-$)
RJN		

☐ The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

☒ All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $ 25.00 per month commencing_____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

☐ The court orders the defendant to pay costs of incarceration at the rate of $_____ per day, (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

☐ ***HIV Testing.*** The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

☐ The defendant shall not have contact with _____ _____ (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until _____ (which does not exceed the maximum statutory sentence).

☐ The defendant is excluded or prohibited from coming within _____(distance) of: ☐ _____ _____(name of protected person(s))'s ☐ home/ residence ☐ work place ☐ school ☐ (other location(s)) _____ _____, or ☐ other location: _____, until _____ (which does not exceed the maximum statutory sentence).

☐ A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Stalking No-Contact Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____ _____ _____ _____

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections:_____ _____.

4.8 **Forfeiture:** The Court hereby forfeits these items: Intratec, 45 caliber Highpoint 9mm to LPD a law enforcement agency.

4.9 **Exoneration:** The Court hereby exonerates any bail, bond and/or personal recognizance conditions.

V. Notices and Signatures

5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). **You are required to contact the Cowlitz County Collections Deputy, 312 SW First Avenue, Kelso, WA 98626, (360) 414-5532 with any change in address or employment or as directed. Failure to make the required payments or advise of any change in circumstances is aviolation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 days in jail.** The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **Community Custody Violation.**
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5a **Firearms. You may not own, use or possess any firearm, and under federal law any firearm or ammunition,** unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. **You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.5b ☐ **Felony Firearm Offender Registration.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Reserved

5.7 ☐ **Department of Licensing Notice:** The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. **Clerk's Action**–The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.285. **Findings for DUI, Physical Control, Felony DUI or Physical Control, Vehicular Assault, or Vehicular Homicide (ACR information) (Check all that apply):**
☐ Within two hours after driving or being in physical control of a vehicle, the defendant had an alcohol concentration of breath or blood (BAC) of ____.
☐ No BAC test result.

☐ BAC Refused. The defendant refused to take a test offered pursuant to RCW 46.20.308.
☐ Drug Related. The defendant was under the influence of or affected by any drug.
☐ THC level was_____ within two hours after driving.
☐ Passenger under age 16. The defendant committed the offense while a passenger under the age of sixteen was in the vehicle.
Vehicle Info.: ☐ Commercial Veh. ☐ 16 Passenger Veh. ☐ Hazmat Veh.

5.8 IF AN APPEAL IS PROPERLY FILED AND APPEAL BOND POSTED, THE DEFENDANT WILL REPORT TO THE DEPARTMENT OF CORRECTIONS, WHO WILL MONITOR THE DEFENDANT DURING THE PENDENCY OF THE APPEAL, SUBJECT TO ANY CONDITIONS IMPOSED BY DOC AND/OR INCLUDED IN THIS JUDGMENT AND SENTENCE AND NOT SPECIFICALLY STAYED BY THE COURT.

5.9 FAILURE TO COMPLY WITH THE CONDITIONS OF THIS JUDGMENT & SENTENCE, INCLUDING ANY REPORTING CONDITIONS OR CONDITIONS OF COMMUNITY CUSTODY, MAY RESULT IN A FORFEITURE OF YOUR RIGHT TO APPEAL AND DISMISSAL OF ANY PENDING APPEAL OR COLLATERAL ATTACK.

5.10 Other: _____.

Done in Open Court and in the presence of the defendant this date: 12-24-2015.

Judge/Print Name: EVANS

Deputy Prosecuting Attorney	Attorney for Defendant	Defendant
WSBA No. 36804	WSBA No. 14179	
Print Name: SEAN BRITTAIN	Print Name: SIMMIE BAER	Print Name: BRADLEY DAVID KNOX

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: _____

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) _____, (state) _____, on (date) _____.

_____ _____

Interpreter Print Name

VI. Identification of the Defendant

SID No. WA11492524
(If no SID complete a separate Applicant card (form FD-258) for State Patrol)

Date of Birth: 9/10/1955

FBI No.: 428045P6

Local ID No. _____

PCN No. _____

Other _____

Alias name, DOB: _____

Race:			Ethnicity:	Sex:
☐ Asian/Pacific Islander	☐ Black/African-American	☒ Caucasian	☐ Hispanic	☒ Male
☐ Native American	☐ Other: _____		☒ Non-Hispanic	☐ Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, Jeanette Kleine Dated: 12/24/15

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date:

_____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk.

The defendant's signature: [signature]

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously
			

EXHIBIT 2&3

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

PERSONAL RESTRAINT OF	)	
	)	No. 52971-8-II
	)	
	)	AFFIDAVIT OF
	)	SEAN BRITTAIN
	)	
BRADLEY KNOX,	)	
	)	
Petitioner	)	

My name is Sean Brittain; I am the Cowlitz County deputy prosecutor who tried the Brad Knox case.

The attached compact disk is a true and correct copy of the state's Exhibit 1, the audio recording of the body wire worn by Otis Pippen that was admitted at RP 582. It is the same audio format and quality as the recording heard by the jury in this case.

S. BA 36809
Sean Brittain, WSBA #

SUBSCRIBED AND SWORN to before me this day of May, 2019.

DANIEL H. BIGELOW
NOTARY PUBLIC
STATE OF WASHINGTON
My Commission Expires February 20, 2020

Daniel H. Bigelow, Notary Public
in and for the County of Wahkiakum, residing
at Cathlamet. My commission expires: 2/20/20

EXHIBIT NO 2

EXHIBIT 4

State v. Fox

Court of Appeals of Washington, Division Two

April 4, 2017, Filed

No. 48466-8-II

Reporter
2017 Wash. App. LEXIS 806 *

THE STATE OF WASHINGTON, *Respondent*, v. DAVID JEREMY FOX, *Appellant*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at State v. Fox, 2017 Wash. App. LEXIS 839 (Wash. Ct. App., Apr. 4, 2017)

Prior History: **[*1]** Appeal from Cowlitz Superior Court. Docket No: 14-1-00645-1. Judge signing: Honorable Marilyn K Haan. Judgment or order under review. Date filed: 12/24/2015.

Counsel: For Appellant: Jennifer Vickers Freeman, Department of Assigned Counsel, Tacoma, WA.

For Respondent: Randall Avery Sutton, Kitsap Co Prosecutor's Office, Port Orchard, WA.

Judges: Authored by Linda Lee. Concurring: Rich Melnick, Thomas Bjorgen.

Opinion by: Linda Lee

Opinion

¶1 LEE, J. — David Jeremy Fox appeals his conviction for delivery of a controlled substance within 1,000 feet of a school bus stop. Fox argues that (1) the Cowlitz County Prosecuting Attorney's Office should have been disqualified; (2) Detective Rocky Epperson provided improper opinion testimony; (3) the prosecutor committed misconduct by arguing Detective Epperson's improper opinion testimony in closing argument; (4) defense counsel provided ineffective assistance; and (5) cumulative error denied him a fair trial. We hold that Fox's right to a fair trial was violated because the Cowlitz County Prosecuting Attorney's Office should have been disqualified.[1] Accordingly, we reverse and remand for further proceedings after the trial court appoints a special deputy prosecutor.

FACTS

¶2 On June 3, 2014, the **[*2]** Cowlitz County Prosecuting Attorney's Office charged Fox by information with one count of delivery of a controlled substance within 1,000 feet of a school bus route stop. Attorney Ryan Jurvakainen from the Cowlitz County Office of Public Defense was appointed to represent Fox.

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[1] This holding is dispositive of this appeal; therefore, we do not address Fox's remaining claims.

EXHIBIT NO 4

¶3 On November 17, 2014, Jurvakainen represented Fox at his omnibus hearing[2] and filed an omnibus application on Fox's behalf. Jurvakainen was later elected prosecutor of Cowlitz County during the pendency of Fox's case and attorney Patricia VanRollins took over representation of Fox.

¶4 Jurvakainen filed a declaration on May 7, 2015, stating that he had not participated in the prosecution of Fox's case and will be screened from the case. Two weeks later, an amended information was filed in Fox's case. Jurvakainen's name was the only name on the signature line of the amended information, and he was identified as the Cowlitz County Prosecuting Attorney.[3]

¶5 At Fox's first trial, the jury was deadlocked. After the trial court declared a mistrial, a second trial was held. The jury in the second trial found Fox guilty of delivery of a controlled substance within 1,000 feet of a school bus route stop. Fox appeals.

ANALYSIS

A. PROSECUTOR'S **[*3]** CONFLICT OF INTEREST

¶6 Fox argues that the Cowlitz County Prosecuting Attorney's Office should have been disqualified from prosecuting his case because the county's elected prosecutor formerly represented him as defense counsel in this case. We agree.

1. RAP 2.5(a)(3)

¶7 The State argues that we should decline to address this issue because Fox failed to raise the issue during trial, and he may not do so for the first time on appeal. We "may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). However, a party may raise a claim involving "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3).

¶8 The proper approach for analyzing whether an alleged error can be raised for the first time on appeal involves four steps.

> First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must **[*4]** address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

1. Affecting a Constitutional Right

¶9 The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments of the U.S. Constitution. *State v. Sanchez*, 171 Wn. App. 518, 541, 288 P.3d 351 (2012); *State v. Sanchez*, 122 Wn. App. 579, 587, 94 P.3d 384 (2004). Our Washington Supreme Court has also held that the Sixth

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[2] The omnibus hearing is set after allowing sufficient time for defense counsel to initiate and complete discovery, conduct further investigation of the case as needed, and continue plea negotiations. CrR 4.5(b).

[3] Jurvakainen's name also appeared on the State's proposed jury instructions.

Amendment provides a right to conflict free counsel. *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). The court has acknowledged that a defendant's right to a fair trial is typically compromised in conflict of interest situations involving a prosecutor and noted:

> The rationale for this [conflict of interest] rule lies in the appearance of impropriety created by vesting the "inherently antagonistic and irreconcilable" roles of the prosecution and the defense in one attorney. *Howerton v. State*, 1982 OK CR 12, 640 P.2d 566, 567. In holding that a part-time district attorney may not represent a criminal defendant anywhere in the state of Oklahoma, the Court of Criminal Appeals of Oklahoma reasoned that although it was difficult or impossible to determine whether the representation was actually affected, "[t]he public has a right to absolute confidence in the integrity and impartiality of the administration **[*5]** of justice. The conflicts presented in this case, at the very minimum, give the proceeding an appearance of being unjust and prejudicial." *Id.* at 568.

State v. Tracer, 173 Wn.2d 708, 720, 272 P.3d 199 (2012) (footnote omitted). The court has also recognized that in conflict situations, it is inherent that from the prosecutor's prior representation of the defendant in the case that the prosecutor "has likely acquired some knowledge of facts upon which the prosecution is predicated or which are closely related thereto." *State v. Stenger*, 111 Wn.2d 516, 521, 760 P.2d 357 (1988).

¶10 Other courts have held that a prosecuting attorney's conflict of interest involves a violation of due process. *See Landers v. State*, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008) (holding that when a prosecuting attorney switches sides in the same criminal case, an actual conflict of interest is apparent that constitutes a due-process violation, even without a specific showing of prejudice); *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (holding that due process was violated when a part-time Commonwealth Attorney had a conflict of interest by prosecuting a defendant for assault while representing the defendant's wife in a divorce action).

¶11 Rules of Professional Conduct (RPC) have been promulgated to prevent conflicts of interest. *See e.g.*, RPC 1.9; *see also* RPC 1.10; *Tracer*, 173 Wn.2d at 718-19. A conflict arises when the prosecutor has "previously personally represented or been consulted **[*6]** professionally by an accused with respect to the offense charged" or closely related matters. *Stenger*, 111 Wn.2d at 520.

¶12 Under RPC 1.9(a), an attorney who has previously represented a client "shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client" consents. Applying this rule, our Washington Supreme Court has held that

> [A] prosecuting attorney is disqualified from acting in a criminal case if the prosecuting attorney has previously personally represented or been consulted professionally by an accused with respect to the offense charged or in relationship to matters so closely interwoven therewith as to be in effect a part thereof. One of the reasons a prosecuting attorney may not participate in such a criminal case is that it is inherent in such a situation that by virtue of the prosecuting attorney's prior representation of an accused, the prosecuting attorney has likely acquired some knowledge of facts upon which the prosecution is predicated or which are closely related thereto. ...
>
> ... .
>
> ... *Where the prosecuting attorney (as distinguished from a deputy prosecuting* ***[*7]*** *attorney) has previously personally represented the accused in the same case or in a matter so closely interwoven*

> *therewith as to be in effect a part thereof, the entire office of which the prosecuting attorney is administrative head should ordinarily also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed.*

Stenger, 111 Wn.2d at 520-22 (emphasis added) (footnotes omitted).

¶13 Here, because Jurvakainen had represented Fox in this case and was later elected county prosecutor during the pendency of Fox's case, a conflict of interest existed, and he was disqualified from the case. In fact, Jurvakainen admitted in his declaration that he was disqualified from the case. And because Jurvakainen became the elected prosecutor for the county, the entire Cowlitz County Prosecuting Attorney's Office should have been disqualified as well, and a special deputy prosecutor should have been appointed.

¶14 Although screening procedures were set in place, such procedures are only sufficient when the prosecutor involved is a deputy prosecutor. The "public has a right to absolute confidence in the integrity and impartiality of the administration of justice" and "[t]he conflicts presented in this case [where **[*8]** one attorney holds the roles of prosecution and defense], at the very minimum, give the proceeding an appearance of being unjust and prejudicial." *Tracer*, 173 Wn.2d at 720 (quoting *Howerton*, 640 P.2d at 567-68).

¶15 Thus, a conflict of interest existed, and because such conflicts give proceedings an appearance of being unjust and prejudicial, Fox's right to a fair trial is implicated. Therefore, Fox has identified a potential error involving a constitutional right.

2. Manifest Error

¶16 In addition to showing an error affecting a constitutional right, Fox must show that the error was manifest. RAP 2.5(a)(3). Because RAP 2.5(a)(3) serves a gatekeeping function, the record must show that there is a fairly strong likelihood that a serious constitutional error has occurred. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

¶17 To obtain review, the party must show how the alleged error actually affected the defendant's rights at trial. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). It is this showing of actual prejudice that makes the error "manifest." *Id.* But "the focus of the actual prejudice [analysis] must be on whether the error is so obvious on the record that the error warrants appellate review." *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). The key to this determination is a plausible showing by the defendant that the alleged error had practical and identifiable consequences in the trial of the case. *Kirkman*, 159 Wn.2d at 935. To **[*9]** determine if such consequences exist, this court "must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *O'Hara*, 167 Wn.2d at 100.

¶18 Here, the record shows that the error was manifest. Jurvakainen had previously represented Fox, appeared at Fox's omnibus hearing, and filed an omnibus application on his behalf. While the case was pending, Jurvakainen was elected county prosecutor. Although Jurvakainen was allegedly screened from Fox's case, an amended information was filed in this case with only Jurvakainen's name on the signature line identifying him as the Cowlitz County Prosecuting Attorney. This record existed during the pendency of Fox's case. The conflict of interest was obvious on the record, and the circumstance could have been

corrected by disqualifying the Cowlitz County Prosecuting Attorney's Office and appointing a special deputy prosecutor in accordance with *Stenger*.[4]

¶19 Thus, because the conflict of interest gave the proceedings an appearance of being unjust and prejudicial, affecting the public's confidence in the integrity and impartiality of the administration of justice, the Cowlitz County **[*10]** Prosecuting Attorney's Office should have been disqualified from prosecuting Fox's case. This conflict of interest could have been readily remedied, but was not, and Fox's right to a fair trial was violated.

¶20 Fox has shown a manifest error affecting his constitutional right to a fair trial. Therefore, we next address the merits of his challenge.

3. Merits of the Conflict of Interest Challenge

¶21 The State argues that the failure to disqualify the prosecuting attorney's office had no effect on the trial of the case. Specifically, the State argues that the record does not show that any confidences Fox may have disclosed were used at trial; that nothing suggested that the trial prosecutor was privy to any of Fox's confidences; and that the State's only witnesses regarding the most determinative facts of the case were the two officers who set up the controlled buy. We disagree.

¶22 Here, a conflict existed because Jurvakainen was Fox's defense attorney, and during that representation, Jurvakainen became the elected county prosecutor. While Jurvakainen represented Fox, an omnibus hearing was held and an omnibus application was filed. Such hearings occur after defense counsel has had sufficient time **[*11]** to initiate and complete discovery, investigate the case, and conduct plea discussions. Therefore, the record shows that Jurvakainen acquired some knowledge of the facts upon which the prosecution was predicated.

¶23 Fox's case proceeded after Jurvakainen became the county prosecutor. Although Jurvakainen filed a declaration stating that he will be screened from Fox's case, an amended information was filed 14 days later against Fox with only Jurvakainen's name in the signature block identifying him as the Cowlitz County Prosecuting Attorney. The RPCs expressly prohibit a lawyer from representing a client if a concurrent conflict of interest exists unless the strict exception is met whereby both clients are informed of the conflict and consent to the representation in writing. Here, no such written consent was secured.

¶24 Given "the appearance of impropriety created by vesting the 'inherently antagonistic and irreconcilable' roles of the prosecution and the defense in one attorney," the proceedings were tainted with "an appearance of being unjust and prejudicial." *Tracer*, 173 Wn.2d at 720 (quoting *Howerton*, 640 P.2d at 567-68). *See also Stenger*, 111 Wn.2d at 522 ("Where the prosecuting attorney (as distinguished from a deputy prosecuting attorney) has previously personally **[*12]** represented the accused in the same case ... [,] the entire office of which the prosecuting attorney is administrative head should ordinarily also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed."). Such appearances tend to erode the public's "absolute confidence in the integrity and impartiality of the administration of justice." *Tracer*, 173 Wn.2d at 720.

¶25 Therefore, under the facts of this case, a conflict of interest existed when the Cowlitz County Prosecuting Attorney's Office continued prosecuting Fox after Jurvakainen became the elected county

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[4] 111 Wn.2d at 522. *See also* RCW 36.27.030.

prosecuting attorney. This conflict created an appearance of impropriety that tainted the appearance of the fairness of the proceedings. The appearance of impropriety was heightened when an amended information was filed in Jurvakainen's name after he was allegedly screened from the case. Thus, we hold that the continued prosecution of Fox's case by the Cowlitz County Prosecuting Attorney's Office was a manifest constitutional error.

4. Harmless Error

¶26 A manifest constitutional error is subject to a constitutional harmless error analysis. *Kirkman*, 159 Wn.2d at 927. If trial error is of constitutional magnitude, prejudice is presumed and the State **[*13]** bears the burden of proving it was harmless beyond a reasonable doubt. *Lamar*, 180 Wn.2d at 588.

¶27 The State fails to present any argument on the issue of harmless error. Therefore, the presumption of prejudice stands. Accordingly, we reverse.

B. ATTORNEY FEES

¶28 Fox requests that we decline to impose appellate costs against him if the State substantially prevails on this appeal and makes a proper request. However, because Fox is the prevailing party, we need not address the issue of appellate costs against him.

CONCLUSION

¶29 A defendant has the right to a fair trial free of conflicts of interest involving a prosecutor. The continued prosecution of a defendant creates a conflict of interest when the defendant's counsel becomes the elected county prosecutor during the prosecution of the defendant's case. Such a conflict of interest gives the proceedings an appearance of being unjust and prejudicial, affecting the public's confidence in the integrity and impartiality of the administration of justice. Therefore, Fox's conflict of interest challenge constitutes a manifest error affecting constitutional right and can be raised for the first time on appeal.

¶30 On the merits, the conflict of interest here violated Fox's right to **[*14]** a fair trial. This constitutional violation is presumptively prejudicial. The State does not argue that the error was harmless. Therefore, the presumption remains.

¶31 Fox's conviction is reversed and remanded for further proceedings after the trial court appoints a special deputy prosecutor.

¶32 A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, C.J., and MELNICK, J., concur.

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EXHIBIT 5

In re Marriage of Miller

Court of Appeals of Washington, Division Three

July 10, 2018, Filed

No. 35143-2-III

Reporter
2018 Wash. App. LEXIS 1585 *; 2018 WL 3359091

In the Matter of the Marriage of WADE AUSTIN MILLER, *Respondent*, and JENAE PAPE MILLER, *Appellant*.

Notice: As amended by order of the Court of Appeals July 10, 2018.
RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported in full at In re Marriage of Miller, 2018 Wash. App. LEXIS 1675 (Wash. Ct. App., July 10, 2018)

Modified by In re Marriage of Miller, 2018 Wash. App. LEXIS 1613 (Wash. Ct. App., July 12, 2018)

Prior History: **[*1]** Appeal from Chelan Superior Court. Docket No: 15-3-00016-9. Judge signing: Honorable Alicia H. Nakata. Judgment or order under review. Date filed: 03/24/2017.

Counsel: Jenae Pape Miller, Appellant, Appearing Pro se, Chelan, WA.

For Respondent: John Ingram Weston Jr., Attorney at Law, Lynnwood, WA; Rani K. Sampson, Overcast Law Offices, PS, Wenatchee, WA.

Judges: Authored by George Fearing. Concurring: Kevin Korsmo, Rebecca Pennell.

Opinion by: George Fearing

Opinion

¶1 FEARING, J. — Jenae Pape appeals from numerous rulings of the trial court attendant to the court's grant of an order of dissolution between Pape and her spouse, Wade Miller. Because Pape fails to cite to the record when outlining facts in her brief, because Pape fails to cite to legal authority in her brief's argument, and because, to the extent we can review the record, the trial court did not abuse its discretion, we affirm all rulings.

FACTS

¶2 On October 25, 1992, Wade Miller (Miller) and Jenae Pape (Pape) wed one another. The Chelan couple begat and raised two boys, Ty and Chad. Miller and Pape owned and managed Blue Water Enterprises, Inc. (Blue Water), doing business as two separate companies, All Seasons Storage and Rental

EXHIBIT NO 5

and Miller Auto Sales. Wade's parents, [*2] Leo and Polly Miller, formed Blue Water on January 30, 1990.

¶3 On November 1, 2014, Wade Miller and Jenae Pape separated. Pape claimed she needed family leave and moved into a separate Chelan rental house.

¶4 As of November 1, 2014, Leo and Polly Miller together owned eight shares, or a ten percent interest, of Blue Water stock. Wade Miller then held sixteen shares, or a twenty percent interest, of the corporation as his separate property interest. The marital community of Miller and Pape owned the remaining fifty-six shares representing a seventy percent ownership. A professional, hired by Miller, valued Blue Water at $1,332,000.

¶5 After the couple's separation, Jenae Pape settled her father's estate. Pape inherited $400,000 in cash, another $781,771 payable at $4,200 a month, a residential building lot in Lake Havasu, Arizona, and an airport hangar in Lake Havasu City, Arizona. Pape purchased a Wenatchee home, which she gifted to her sons Ty and Chad. The boys have since sold the house and placed the proceeds into a bank account.

PROCEDURE

¶6 On January 8, 2015, Wade Miller filed for legal separation. Miller and Jenae Pape's two children were no longer dependent. The husband and wife agreed to [*3] evenly divide all community property. Pape, however, did not agree with Miller's valuation of community property, but she failed to present any evidence to counter her husband's business valuations, appraisals, and amount of corporate stock. During the pendency of the proceeding before the trial court, Pape filed more than ten pretrial motions, which included three motions to change venue.

¶7 Jenae Pape sent interrogatories to Wade Miller to answer. During a hearing on another motion, Pape asked the trial court to compel Miller to answer the interrogatories. Despite the request, Pape acknowledged she received answers to interrogatories a year and one half earlier. The court denied the motion for many reasons. The trial court remarked:

> THE COURT: All right. Pursuant to CR 26(i), which reads as follows, "The Court will not entertain any motion or objection with respect to Rules 26 through 37, unless Counsel have conferred with respect to the motion or objection." The Court does not have before it a motion to compel, nor does it have before it a certification that, in fact, 26(i) has been complied with. Consequently, the Respondent's motion to compel, well, oral motion this morning to compel is denied.

Report of Proceedings [*4] (RP) at 47.

¶8 On the day before the scheduled trial, Jenae Pape moved again to change venue and moved to cancel the trial date. After reviewing pleadings and entertaining arguments, the trial court denied the motion. The court commented:

> THE COURT: The Court's going to treat the documents that you've put forward this morning and your oral argument as a motion for a continuance of this upcoming trial. There was a letter sent out to the parties November 4th 2016 regarding the notice of the trial date setting the case for trial for five days, January 23rd through the 27th. There was also a settlement conference, which was scheduled in front of Judge Small, on January 4th, which the Court believes that both sides did participate in.

Ms. Pape-Miller puts forward today that she's had a District Court trial on January 3rd 2017 regarding a criminal matter that she's assisting her attorney in appealing. She's also had a hearing in this case on a previous motion for change of venue on January 10th 2017. She now puts forward that she wants to have a continuance because she believes that based upon her surgery on December 23rd that she needs more time to get her activities and life back in order, pursuant [*5] to this note from Dr. Witt. However, as pointed out by the Respondent, what that means is unclear to the Court, and it would appear that based upon the actions since the surgery on December 23rd that Ms. Pape-Miller's health has been sufficient to litigate her criminal District Court matter, participate in a settlement conference, come to Court and file pleadings and present oral argument regarding her motion for change of venue to Okanogan County, and consequently the Court's going to deny her motion asking for a continuance based upon being — her health being such that she should not be required to participate in the trial and that, again, her subsequent activities would indicate that her health is such that she can participate—

MS. PAPE-MILLER: So being homeless is not—

THE COURT: Just a minute. So, as pointed out by the Petitioner, there is a great deal of preparation that goes into getting a matter ready to go to trial, and the Court believes that that should not go to waste.

RP at 12-14.

¶9 During trial, pro se Jenae Pape called three witnesses to testify regarding asset valuation. Pape's accountant, Amedee Sanchez, testified regarding Miller and Pape's retirement account. Contrary to Pape's [*6] expectations, a second witness, Matt Froman, an equipment vendor, denied any recollection of advising Miller that All Seasons Storage and Rental alone was worth $4,300,000. Pape questioned her friend, April Roberts, regarding Pape's work for the family's rental business. Pape also cross-examined Miller's father, Leo Miller regarding a trust Pape claimed Leo established in favor of his son. Leo Miller denied he ever created such a trust.

¶10 Trial evidence showed that Jenae Pape attempted to conceal some of her assets from Wade Miller. Following the couple's separation, Pape acquired a condominium in Lake Chelan and a beach cabin in Moclips. Pape objected, on the ground of confidentiality, to the admission of exhibits that confirmed her purchase of the homes. During the trial, the following exchange occurred between Pape and opposing counsel:

Q: Okay. As I recollect, you transferred $400,000.00 in early 2016—I'm sorry, in May of 2016 to Chase in order to buy the condominium in, in Chelan, am I correct?

A: Even though it's illegal for you to know this information, yes, I did.

Q: Yes. And when you got done with that purchase, there was approximately $242,000.00 in that account, and are you saying [*7] now that that's no longer there?

A: I don't have any money with Chase bank, no.

Q: Okay. Did you take and switch that to another bank?

A: Yeah.

Q: Okay.

A: Which is none of your business, either.

Q: All right. And with regards to the Wheatland Bank, you bought the Moclips property from the 474,000.00 (inaudible — away from mic) had left in Wheatland Bank, am I correct?

A: I don't, I don't recall how much was in any bank account because I don't have the records on me. RP at 86.

¶11 At the conclusion of trial, the trial court awarded each party his or her separate property. The court valued Wade Miller's separate property at $333,750, and Jenae Pape's separate property at $1,189,593. The trial court valued the community property interest of the corporation, Blue Water, to be a gross value of $1,443,000 and a net value of $1,122,333. The trial court awarded Wade Miller the parties' entire interest in Blue Water and granted Pape an equalizing money judgment against Miller of $387,997.50.

¶12 The trial court refused to consider a dog gifted by Jenae Pape to one of her sons as either community or separate property. The court denied Pape spousal support because she failed to demonstrate a need for it.

LAW AND ANALYSIS **[*8]**

¶13 On appeal, Jenae Pape assigns error to the trial court's denial of her multiple motions for change of venue, denial of her motion to compel responses to interrogatories, the court's refusal to recuse itself due to a conflict of interest, denial of Pape's request for anti-harassment orders, failure to uphold the laws of the State of Washington, refusal to keep Pape safe, refusal to explain why Pape alienated her children, and the court's inequitable division of the parties' property,

¶14 We are unable to ably address Jenae Pape's assignments of error for several reasons. First, despite a ten page introduction that purports to outline facts and a twelve page statement of case in her opening brief, Pape provides the court no citations to the trial court record such that this court cannot confirm whether she accurately recites the facts. RAP 10.3(a)(5) demands that a party refer to the record for each factual statement in her brief. Second, Pape inserts in her opening brief a one page argument that contains no citation to legal authority to support her legal contentions. RAP 10.3(a)(6) mandates that a party insert, in her brief, an argument in support of the issues presented for review, together with citations to legal **[*9]** authority and references to relevant parts of the record.

¶15 Because of Jenae Pape's violation of court rules, we need not further address her appeal. Nevertheless, to the extent possible, we review some of her assignments of error.

¶16 Jenae Pape assigns error to the presiding judge, Alicia Nakata, for refusal to recuse herself from the marital separation proceeding. Nevertheless, Pape fails to cite the trial court record to establish that she sought recusal below. She fails to cite the trial court record to confirm that her factual arguments hold truth regarding the purported grounds for recusal.

¶17 Jenae Pape contends that Judge Alicia Nakata is a former prosecutor. Pape then alleges the trial court's bias emanates from Judge Nakata's former relationship as a prosecutor with police officers related to Wade Miller's girlfriend. Assuming all of these allegations to be true, Pape still fails to establish any partiality in Judge Nakata.

¶18 We have reviewed portions of the trial court record. The record shows that Judge Nakata functioned objectively and imposed a fair process. Judge Nakata expended patience in accommodating pro se Pape,

despite Pape threatening to sue her. In his response, Wade Miller **[*10]** highlights an occurrence during trial when the trial court assisted Pape in admitting an exhibit into evidence over Miller's objection.

¶19 A judge shall disqualify herself in any proceeding in which the judge's impartiality might reasonably be questioned. CJC 2.11. Generally, disqualification is required when a judge has participated as a lawyer in the case being adjudicated. Nevertheless, unless a party shows bias, a judge is not disqualified merely because he or she worked as a lawyer for or against a party in a previous, unrelated case. *State v. Dominguez*, 81 Wn. App. 325, 329, 914 P.2d 141 (1996). Here Judge Nakata never even represented one of the parties. Recusal decisions are reviewed for an abuse of discretion. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 840, 14 P.3d 877 (2000).

¶20 Jenae Pape also appeals the trial court's division of the couple's property. This court reviews the division of property for an abuse of discretion. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). The trial court has broad discretion, which we will reverse only if exercised on untenable grounds or for untenable reasons. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242-43, 170 P.3d 572 (2007). This court recognizes that the trial court sits in the best position to assess the assets and liabilities of the parties and to determine what constitutes an equitable outcome. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). If, however, the decree results in a patent disparity in the parties' economic circumstances, **[*11]** a manifest abuse of discretion has occurred. *In re Marriage of Rockwell*, 141 Wn. App. at 243.

¶21 Under statute, the trial court should divide the marital couple's property "as shall appear just and equitable." RCW 26.09.080. This statute requires the trial court to consider "all relevant factors including, but not limited to: (1) the nature and extent of the community property; (2) the nature and extent of the separate property; (3) the duration of the marriage ... ; and (4) the economic circumstances of each spouse at the time division of the property is to become effective." RCW 26.09.080.

¶22 Jenae Pape's challenge to the trial court's division of property bounces between unrelated thoughts and includes baseless assertions. We note that the trial court distributed Pape more than $1,000,000 in separate property and that Pape received more property than Wade Miller. We conclude the trial court did not abuse its discretion.

¶23 Jenae Pape assigns error to the trial court's entering exhibits that showed she purchased a Chelan condominium and a beach cabin in Moclips. This assignment of error serves no purpose. The court ruled that Pape owned the cabin and condominium as her separate property because she purchased each with her inheritance after the couple separated.

¶24 **[*12]** Jenae Pape believes Leo Miller concealed funds into a trust account for Wade Miller's benefit. Leo Miller testified to the contrary. The trial court entered no finding of fact regarding a trust account. The absence of a specific finding as to a material fact functions as a finding against the party who has the burden of proof, here Pape. *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn. App. 463, 475, 767 P.2d 961 (1989). The trial court held discretion to determine who told the truth regarding the existence or nonexistence of a trust benefitting Miller. In our review, we neither weigh the evidence nor judge the credibility of the witnesses. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

¶25 Jenae Pape asks if the trial court erred in granting her dog, Lucy, to Wade Miller. The record, however, shows that the trial court did not award the dog to either litigant because the testimony showed the dog to belong to the couple's son, Chad.

¶26 Jenae Pape confusingly complains that the trial court awarded a Chelan home to either her or Wade Miller. Nevertheless, Pape testified she gifted the home to her sons, the sons sold the home, and the two boys split the proceeds. The trial court ruled the home's proceeds were neither community nor separate property.

¶27 Wade Miller requests attorney fees on appeal on more than one basis. First, Miller, pursuant to RAP 18.9(a), requests fees because of a frivolous appeal. Second, Wade requests attorney fees due to Pape's intransigence. *MacKenzie v. Barthol*, 142 Wn. App. 235, 242, 173 P.3d 980 (2007). Third, Miller requests attorney fees because Pape used court proceedings for an improper **[*13]** purpose. Miller claims that Pape holds familiarity with the legal process since she was a paralegal before marriage and that Pape flouted court rules in an attempt to plant wild and salacious rumors.

¶28 We agree with Wade Miller that Jenae Pape forwarded a frivolous appeal, particularly in light of her failure to cite to the trial court record and to legal authority in her brief's argument. We grant Miller reasonable attorney fees and costs incurred on appeal.

¶29 Wade Miller also seeks sanctions against Jenae Pape, pursuant to RAP 10.7, because Pape failed to include accurate record citations. *Hurlbert v. Gordon*, 64 Wn. App. 386, 399, 824 P.2d 1238 (1992). Actually, Pape provided no record citations rather than misciting the record. We decline sanctions anyway since we grant Miller reasonable attorney fees and costs on other grounds.

CONCLUSION

¶30 We affirm all rulings of the trial court. We grant Wade Miller reasonable attorney fees and costs on appeal.

¶31 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

PENNELL, A.C.J., and KORSMO, J., concur.

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EXHIBIT 6

In re Dependency of S.R.P.W.

Court of Appeals of Washington, Division One

January 14, 2019, Filed

No. 78195-2-I (Consolidated with No. 78196-1-I and No. 78197-9-I)

Reporter
2019 Wash. App. LEXIS 61 *; 2019 WL 181996

In the Matter of the Dependency of S.R.P.W. ET AL., *Minor Children*. THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *Respondent*, v. SHARRAH WOOD, *Appellant*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at In re Dependency of S.R.P.W., 2019 Wash. App. LEXIS 116 (Wash. Ct. App., Jan. 14, 2019)

Prior History: **[*1]** Appeal from Snohomish Superior Court. Docket No: 17-7-00253-1. Judge signing: Honorable Michael T Downes. Judgment or order under review. Date filed: 02/21/2018.

Counsel: For Appellant: Jan Trasen, Attorney at Law, Seattle, WA.

For Respondent: Lauren Danskine, Attorney at Law, Everett, WA.

Amicus Curiae on behalf of Disability Rights Washington: Susan L Kas, Disability Rights Washington, Seattle, WA; Rosemary Ann Ford, Attorney at Law, West Richland, WA.

For Other Parties: Stephen B. Curtis, Law Offices of Steve Curtis, Everett, WA.

Judges: Authored by J. Leach. Concurring: Lori Smith, Ann Schindler.

Opinion by: J. Leach

Opinion

¶1 LEACH, J. — Sharrah Wood appeals the termination of her parental rights to three children. She claims that substantial evidence does not support the trial court's finding that all necessary services capable of remedying her parental deficiencies were offered or provided, that a neuropsychological evaluation was not a necessary service, and that termination of her parental rights was in the best interests of the children. We disagree and affirm.

FACTS

EXHIBIT NO 6

¶2 Sharrah Wood is the mother of three children ranging from seven to five years of age: K.R.T.W., S.R.P.W., and K.R.-K.W.[1] The parental rights of the children's **[*2]** fathers are not at issue in this appeal.[2]

¶3 In April 2015, Wood and her three children lost their housing due to flooding. The family then reportedly began living in a van with Wood's mother, Wood's sister, and her sister's two young children. When not living in the van, the family stayed on the floor of friends' houses. Once notified, the Department of Social and Health Services[3] (Department) offered Wood voluntary services that included Family Assessment Response (FAR) and Project SafeCare. Wood initially participated in these services, but she was unable to complete them.

¶4 In December 2015, the Department received allegations that Wood's children were continuing to be neglected and suffering from housing instability. On December 22, 2015, the Department filed a dependency petition for each child based on Wood's alleged lack of supervision, chronic neglect, mental health issues, lack of parenting skills, and lack of safe and stable housing. At the shelter care hearing on December 30, 2015, the trial court removed the children from Wood's care. They never returned to her care.

¶5 In April 2016, the Department filed agreed dependency and disposition orders for each child. The Department identified **[*3]** Wood's primary parenting deficiencies as mental health issues, lack of parenting skills, and lack of stable and suitable housing. Throughout the course of the dependency, the Department offered Wood multiple services designed to help remedy her parental deficiencies. These services included a psychological evaluation with a parenting component, a mental health assessment and individual counseling, parenting classes, family preservation services, case management, random urinalyses (UAs), a drug and alcohol evaluation, and Project Aware (domestic violence support group). Among other things, the trial court's dependency orders required Wood to notify the Department about any problems in accessing services.

¶6 At later dependency review and permanency planning hearings, the trial court determined that Wood was either partially in compliance or not in compliance with its orders and that Wood was not making progress toward correcting her parental deficiencies. In March 2017, the Department filed a petition to terminate Wood's parental rights to each child. The Department made the same allegations for each child and asserted that Wood "does not understand and is incapable of providing for the **[*4]** child's emotional, physical, mental, and developmental needs. [Wood] is incapable of safely parenting the child."

¶7 The termination trial took place over several days in January 2018. After hearing testimony from Wood, a Department social worker, a family preservation services provider, two visitation supervisors, K.R.-K.W.'s counselor, a chemical dependency provider, a psychologist, and considering more than 60 exhibits, the trial court ordered termination of Wood's parental rights as to all three children. In its termination order, the trial court made more than 200 findings of fact, the majority of which Wood does not dispute in this appeal. We discuss additional facts in the relevant sections below.

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[1] Wood is also the mother to another child, K.W. Her parental rights as to KW. were previously terminated and are not at issue in this appeal.

[2] The parental rights of the fathers of S.R.P.W. and K.R.-K.W. were previously terminated. At the time of trial, the parental rights of the father of K.R.T.W. were still intact.

[3] As of July 1, 2018. the "Department of Children, Youth, and Families" has assumed the functions and duties of the Department of Social and Health Services. *See* RCW 43.216.906.

STANDARD OF REVIEW

¶8 The United States Constitution protects parental rights as a fundamental liberty interest.[4] To terminate a parent's rights, the Department must satisfy a two-pronged test.[5] The first prong requires proof of the six factors described in RCW 13.34.180(1).[6] The Department must prove these factors by clear, cogent, and convincing evidence.[7] Clear, cogent, and convincing evidence exists when the evidence shows that an ultimate fact in issue is highly probable.[8] If the Department satisfies the first **[*5]** prong, the court proceeds to the second prong, determining whether termination is in the child's best interests.[9] The Department must prove this second prong by a preponderance of the evidence.[10]

¶9 If substantial evidence supports the trial court's findings, we must affirm the termination order.[11] "'[E]vidence is substantial if, when viewed in the light most favorable to the party prevailing below, it is such that a rational trier of fact could find the fact in question by a preponderance of the evidence.'"[12] In this review, we do not make credibility determinations or weigh the evidence.[13] "Deference paid to the trial judge's advantage in having the witnesses before him [or her] is particularly important in deprivation proceedings."[14] We consider unchallenged findings as true on appeal.[15]

ANALYSIS

All Necessary and Available Services[16]

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[4] *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

[5] *In re Dependency of K.N.J.*, 171 Wn.2d 568, 576, 257 P.3d 522 (2011).

[6] RCW 13.34.180(1) requires the Department to prove (a) the child has been found to be a dependent child; (b) the court has entered a dispositional order pursuant to RCW 13.34.130; (c) the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency; (d) the services rendered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided; (e) there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future; and (f) continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

[7] *K.N.J.*, 171 Wn.2d at 576-77.

[8] *In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904 P.2d 1132 (1995).

[9] RCW 13.34.190(1)(b).

[10] *In re Welfare of A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010).

[11] *In re Dependency of T.R.*, 108 Wn. App. 149, 161, 29 P.3d 1275 (2001).

[12] *In re Dependency of E.L.F.*, 117 Wn. App. 241, 245, 70 P.3d 163 (2003) (alteration in original) (quoting *In re Dependency of M.P.*, 76 Wn. App. 87, 90-91, 882 P.2d 1180 (1994)).

[13] *In re Welfare of C.B.*, 134 Wn. App. 942, 953, 143 P.3d 846 (2006).

[14] *In re Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980).

¶10 Wood alleges that by not tailoring services to accommodate her cognitive and developmental disabilities,[17] the Department failed to prove that it offered or provided her all reasonably available, necessary services capable of correcting her parental deficiencies within the foreseeable future. We disagree. Though the Department must prove it offered services specifically tailored **[*6]** to the individual parent's needs,[18] it is not obligated to offer additional services that might have been helpful if the parent is unwilling or unable to make use of available services.[19] The Department is not required to offer or provide services that would be futile.[20]

¶11 For the first time on appeal, Wood argues that the Department was statutorily obligated to consult with its Developmental Disabilities Administration (DDA) to coordinate a tailored service plan for accommodating her specific cognitive limitations, but it failed to do so.[21] A review of the record shows that Wood did not raise this issue before the trial court.

¶12 Generally, we will not consider issues raised for the first time on appeal. However, a "party may raise for the first time on appeal a manifest error affecting a constitutional right."[22] The appellant has the burden of demonstrating the basis for reviewing an issue for the first time on appeal.[23] Here, Wood fails to address RAP 2.5(a) and offers no basis for reviewing her DDA consultation claim for the first time on appeal. She has not met her burden.

¶13 Wood also argues that "[a]lthough the Department provided several different services, and although [she] engaged in some ... her inability **[*7]** to [make] progress was due to the lack of accommodation of her disability." Contrarily, the record shows that Wood did not trust the Department and refused to work with the Department regardless of the type and number of services offered or provided.

¶14 In January 2016, the Department referred Wood to parenting classes. Although Wood began to attend the classes, she was terminated because of too many absences. The Department re-referred Wood to parenting classes in May 2016, but she did not attend.

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[15] *In re Dependency of J.M.R.*, 160 Wn. App. 929, 939 n.5, 249 P.3d 193., 160 Wn. App. 929, 249 P.3d 193 (2011).

[16] This issue encompasses Wood's challenge to findings of fact 2.181, 2.182, 2.189, 2.208, and 2.209.

[17] Wood has a reported IQ of 64. In school, she was enrolled in special education classes. She did not complete high school and never earned a diploma or General Equivalency Degree (GED).

[18] *In re Dependency of D.A.*, 124 Wn. App. 644, 651, 102 P.3d 847 (2004).

[19] *In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988).

[20] "'Where the record establishes that the offer of services would be futile, the trial court can make a finding that the Department has offered all reasonable services.'" *In re Welfare of C.S.*, 168 Wn.2d 51, 56 n.2, 225 P.3d 953 (2010) (quoting *In re Welfare of M.R.H.*, 145 Wn. App. 10, 25, 188 P.3d 510 (2008)).

[21] *See* RCW 13.34.136(2)(b)(i)(B). Similarly, amicus curiae Disability Rights Washington argues that the Department failed to discharge its duty to consult with DDA as to the provision of tailored services to address Wood's intellectual disabilities before terminating her parental rights.

[22] *In re Adoption of M.S.M.-P.*, 181 Wn. App. 301, 312, 325 P.3d 392 (2014) (citing RAP 2.5(a)(3)). "A manifest error requires a showing of actual prejudice." *M.S.M.-P.*, 181 Wn. App. at 312. Actual prejudice requires a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

[23] *State v. Grimes*, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011).

¶15 In May 2016, the Department referred Wood to Dr. Walker for a psychological evaluation with a parenting component. Wood attended the first session with Dr. Walker but began throwing chairs around in the waiting room and frightened staff with her behavior. Dr. Walker refused to work with Wood any further after this incident. The Department then referred Wood to Dr. O'Leary for the same evaluation, but she missed the appointment, and Dr, O'Leary refused to work with her. Finally, in December 2016, the Department referred Wood to Dr. Swing for a psychological evaluation and parenting component. It took Dr. Swing five months to get Wood in for an appointment.[24] Wood did not work cooperatively with **[*8]** Dr. Swing and did not fully complete Dr. Swing's evaluation. Notably, Wood refused to take the Wechsler Adult Intelligence Scale, 4th edition, which is an assessment tool Dr. Swing sought to use in assessing Wood's current intellectual functioning.

¶16 Also in May 2016, the Department referred Wood to Compass Health for a mental health assessment and counseling. From May to December 2016, she attended only six counseling sessions even though she was authorized to participate in up to four sessions a month. At her last counseling session in December 2016, she was more than three hours late for the appointment and only sought help paying $2,000 in back rent and a $1,140 electric bill. Several months later, the Department referred Wood to another mental health provider, but she declined and said that she would find her own counselor. She never did. The trial court determined that mental health treatment has been offered to Wood repeatedly, but she refused to go.

¶17 In September 2016, the Department referred Wood to Positive Parenting Program (Triple P) for parent coaching. Because Wood's visitation of her children was so inconsistent at that time, the Triple P provider could not work with Wood **[*9]** and, instead, recommended Family Preservation Services (FPS) as an appropriate service for parent coaching. The Department referred Wood to an FPS provider in June 2017. However, Wood ultimately refused to work with the FPS provider despite the provider's multiple attempts and methods of doing so. The FPS provider testified that during a telephone call, Wood stated "she was intentionally ignoring me because she was not comfortable working with me, knowing that ... I would be sharing information with her social worker."

¶18 In April 2017, Wood received referrals for random UAs and a drug and alcohol evaluation. She never completed either service. In September 2017, Dr. Swing recommended that Wood receive job training through the Division of Vocational Rehabilitation. The Department offered Wood a referral, but she refused the service.[25]

¶19 The Department and the FPS provider offered Wood housing information and resources. At trial, however, Wood testified that she still did not have housing appropriate for reunification with her children and acknowledged that the children could not return to her care until she located appropriate housing.

¶20 Wood repeatedly confirmed that she had "a lot of trust **[*10]** issues with the Department" and limited the extent to which she engaged or cooperated with service providers recommended by the Department.

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[24] The Department and Dr. Swing made numerous efforts to get Wood to Dr. Swing's office. Wood "failed to appear for some appointments, refused others, and did not respond to some other offered dates."

[25] Dr. Swing also recommended other services for Wood, including a domestic violence support group, Parent-Child Interaction Therapy (PCIT), and Eye Movement Desensitization and Reprocessing (EMDR) treatment. The Department referred Wood to Project Aware for domestic violence victims, and Wood attended the support group. However, the Department was unable to offer PCIT to Wood due to the inadequate amount of time she had with her children. Similarly, the Department was unable to offer Wood EMDR services due to lack of providers in her area and because Wood needed to engage in a minimum of six months of general counseling treatment prior to engaging in EMDR treatment.

She indicated an unwillingness to work with any service provider who would later report back to the Department. The trial court's unchallenged finding of fact 2.191 establishes that Wood "has refused to work with providers who would provide information to the Department. Although she testified on cross-examination by her own lawyer that she would engage in services, such testimony was weak and not credible."[26] The trial court also found, in pertinent part:

> 2.181 To the degree that the mother suffers cognitive impairment, the Department made efforts to accommodate the mother's impairments. The mother was offered interactive parenting education. The mother received extra assistance from the social worker with making appointments, making phone calls, and making transportation arrangements. The social worker tried very hard to explain things to the mother in a variety of ways. The social worker ensured that information was provided both by herself as well as by the mother's Office of Public Defense social worker.
>
> 2.182 So all of the court-ordered and necessary **[*11]** services capable of correcting parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.
>
> . . . .
>
> 2.189 Additionally, it's very clear beyond the required standard of clear, cogent, and convincing evidence that making any future referrals of any kind including re-referring anything and everything that has already been done, is futile.
>
> . . . .
>
> 2.208 Even if the mother were to engage in services and achieve the best possible progress, the near future for these children is outside of the two years that it would take to reunify these children with their mother.
>
> 2.209 There is little likelihood that conditions will be remedied so that the child can be returned to the parents [sic] in the near future.

¶21 In view of this record, it is apparent that Wood's lack of progress stems from her distrust of the Department and her failure to participate fully in the services offered. Substantial evidence supports the trial court's findings that the Department offered or provided all necessary and reasonably available services capable of correcting parental deficiencies within the foreseeable future and that any additional service referrals would be futile. **[*12]**

¶22 Wood relies on *In re Parental Rights to I.M.-M.*[27] as further support of her argument on this issue. Her reliance on *I.M.-M.* is misplaced. In *I.M.-M.*, the mother promptly completed a court-ordered psychological evaluation that showed she had significant cognitive impairment impacting her ability to succeed in services. There, the record demonstrated that additional services *would not be futile.* In *I.M.-M.*, the mother showed a willingness to engage with the Department and

> made notable efforts to engage in services and work with her providers. She promptly obtained a mental health evaluation, a chemical dependency evaluation, and a parenting assessment, as requested by the Department. Despite being homeless, [the mother] kept in basic touch with her social workers. She engaged in various types of recommended services, including mental health therapy that was

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[26] Furthermore, Wood does not dispute finding of fact 2.204 ("The mother has a profound distrust of the Department. The mother will not work towards fixing things.") or finding of fact 2.205 ("The mother's assertions at trial that she would now be willing to work with the Department were weak, hollow, and just not credible.").

[27] 196 Wn. App. 914, 385 P.3d 268 (2016).

"pretty consist" over the course of two years. [The mother] also regularly participated in visitations with her children up until the very end of the dependency.[28]

¶23 Unlike the mother in *E.M.-M.*, Wood did not promptly or diligently participate in many of the services offered, Wood utterly refused to participate in others, Wood did not regularly **[*13]** participate in visits with her children, and Wood did not make any progress in improving her parental deficiencies in more than two years.

Neuropsychological Evaluation[29]

¶24 The trial court found that "Dr. Swing agreed that a neuropsychological evaluation could possibly provide some useful information, but no additional service recommendations would flow from it" and that "[a] neuropsychological evaluation was not a necessary service." Wood argues that the trial court erred in entering these findings, as well as related findings that all necessary services have been offered,[30] because these findings are not supported by substantial evidence. This argument is unpersuasive.

¶25 The record establishes by clear, cogent, and convincing evidence that a neuropsychological evaluation was not a necessary service under the circumstances. The unchallenged findings of fact establish:

2.170 A neuropsychological evaluation was not court ordered and was never recommended as a service.

2.171 Dr. Swing did not recommend a neuropsychological evaluation in her September [2017] report.

2.172 Dr. Swing reviewed as collateral information a psychological evaluation previously completed . . . that the mother had previously **[*14]** been diagnosed with an IQ of 64.

2.173 Dr. Swing attempted to assess the mother's current cognitive functioning, but the mother refused to engage in the necessary testing.

2.174 Based on her observations of the mother's functioning, Dr. Swing diagnosed the mother's intellectual impairment as less severe as prior evaluators.

2.175 Dr. Swing noted that the mother seemed to operate at a higher level than her old I.Q. scores would indicate.

2.176 Dr. Swing did not recommend a neuropsychological evaluation because it was not apparent to her that it was needed.

¶26 At trial, Dr. Swing testified that Wood "didn't show the same level of impairment with someone who I would—or who I would traditionally think of operating at an I.Q. of below 70" and that while Wood has "impairments in functioning in many areas, it seems ... more related to psychological and emotional difficulties than it is cognitive difficulties in and of itself."

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[28] *E.M.-M.*, 196 Wn. App. at 925 (footnote and citation omitted).

[29] This issue encompasses Wood's challenge to findings of fact 2.177, 2.178, 2.182, and 2.197.

[30] These related findings include finding of fact 2.182 ("So all of the court-ordered and necessary services capable of correcting parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.") and finding of fact 2.197 ("Services ordered under RCW 13.34.136 have been expressly and understandably offered or provided, and all necessary services reasonably available, capable of correcting the parents' [sic] parental deficiencies within the foreseeable future, have been expressly and understandably offered or provided to the parents [sic].")

¶27 The trial court's finding that a neuropsychological evaluation was not a necessary service is supported by substantial evidence. Additionally, as previously indicated, substantial evidence also supports the finding that an offer of any additional services to Wood, such as **[*15]** a neuropsychological evaluation, would have been futile.

Best Interests of the Children[31]

¶28 Next, Wood disputes the trial court's determination that termination is in her children's best interests. She points to evidence that supports a strong, loving bond between her and the children.

¶29 We consider the facts and circumstances of each individual case to determine the child's best interests.[32] Therefore, we place a "'*very strong* reliance on trial court determinations of what course of action will be in the best interests of the child.'"[33] Without question, "a child has the right to basic nurturing, which includes the right to a safe, stable, and permanent home and the speedy resolution of dependency and termination proceedings."[34] If the child's rights conflict with the parent's rights, the child's rights should prevail.[35]

¶30 Wood does not dispute the trial court's finding of fact 2.214:

> [The children] have already been out of home for two years. Reunification is at least another two years away. If the mother fully engaged, it would be six to nine months to begin to show progress. These three children can no longer wait for their mother to learn to parent.

¶31 She also does not dispute the court's finding that **[*16]** she was unaware of her children's many special needs or finding of fact 2.218: "Continuation of the parent-child relationship clearly diminishes the child[ren]'s prospect for early integration into a stable and permanent home." We accept these findings as true. Further, Wood testified that she was no more prepared to take her children home at the time of trial than she was on the day she agreed that her children were dependent.

¶32 "Where a parent has been unable to rehabilitate over a lengthy dependency period, a court is 'fully justified' in finding termination in the child's best interests rather than 'leaving [the child] in the limbo of foster care for an indefinite period'" while the parent attempts rehabilitation.[36] While Wood has expressed genuine love for her children, she has not shown progress in addressing her parental deficiencies. Accordingly, the preponderance of the evidence supports the trial court's best interests finding.

Trial Court's Personal Animus

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[31] This issue corresponds to Wood's challenge to findings of fact 2.208, 2.209, 2.219, and 2.220.

[32] *In re Dependency of A.V.D.*, 62 Wn. App. 562, 572, 815 P.2d 277 (1991) (citing *Aschauer*, 93 Wn.2d at 695).

[33] *In re Pawling*, 101 Wn.2d 392, 401, 679 P.2d 916 (1984) (quoting *In re Welfare of Todd*, 68 Wn.2d 587, 591, 414 P.2d 605 (1966)).

[34] *T.R.*, 108 Wn. App. at 154 (citing RCW 13.34.020).

[35] RCW 13.34.020.

[36] *T.R.*, 108 Wn. App. at 167 (quoting *In re A.W.*, 53 Wn. App. 22, 33, 765 P.2d 307 (1988)).

¶33 Lastly, Wood argues that the trial court "erred when it permitted its personal animus against the mother to permeate its findings of fact" As purported examples of this animus, Wood points to finding of fact 2.193 (finding the **[*17]** mother is "poorly educated, has at the age of 28 never held a job of any kind for any period, and apparently has no interest in doing so") and finding of fact 2.195 (finding the mother "has utterly no interest in learning"). Wood claims that in light of her developmental disabilities, these findings detract from the trial court's appearance of fairness and impartiality.

¶34 We presume that a trial court performs its duties without bias or prejudice.[37] The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias.[38]

¶35 The findings Wood cites are not evidence of the trial court's actual or potential animus. Rather, these findings are summaries of Wood's trial testimony. For instance, when asked why she had never worked, Wood answered, "I hadn't really thought about it." Later, when asked if she would be willing to cooperate with the Department to get some job training or skills, Wood answered: "I am not" Wood also testified she was unaware of any special needs that her children may have and expressed a belief that "they're typical ... kids"[39] but did not otherwise testify to learning more about any perceived special needs of her children. **[*18]**

¶36 Upon review of the record and context in which the trial court made these findings, Wood has not produced evidence that would lead a reasonable person to believe the trial court was biased in any way. Wood's animus claim lacks merit.

CONCLUSION

¶37 Substantial evidence supports the trial court's determination that the Department offered or provided Wood with all reasonably available services capable of correcting her parental deficiencies in the foreseeable future and that a neuropsychological evaluation was not a necessary service. Any additional services offered to Wood would have been futile. Substantial evidence also supports the trial court's finding that termination of Wood's parental rights to S.R.P.W., K.R.T.W., and K.R.-K.W. is in their best interests. We affirm.

SMITH and SCHINDLER, JJ., concur.

Reconsideration denied March 4, 2019.

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[37] *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009).

[38] *State v. Dominguez*, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996).

[39] However, the trial court's uncontested finding of fact 2.194 establishes that the children are not typically developing: "The mother claims to have no awareness of any special needs of any of her children. ... In the face of evidence that her own children are, in fact, in need of a great deal of help in many spheres, she testified that they are typical kids."

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

PERSONAL RESTRAINT OF	No. 52971-8-II
BRADLEY DAVID KNOX, Appellant	AFFIDAVIT OF MAILING

GERI L. ROOKLIDGE, having first been duly sworn on oath, deposes and says:

1. I am the administrative assistant for the Wahkiakum Prosecuting Attorney.

2. On May 10th, 2019, I sent by U.S. Mail, postage prepaid, to Neil M. Fox, Attorney at Law, 2125 Western Avenue, Suite 330, Seattle, WA 98101, and Derek M. Byrne, Court Clerk, Washington State Court of Appeals, Division, II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454, the following documents: ***Response to Personal Restraint Petition.***

Geri L. Rooklidge
GERI L. ROOKLIDGE

SUBSCRIBED AND SWORN to before me this 10th day of May, 2019.

Teresa G. McMahon
Teresa G. McMahon, Notary Public
in and for the County of Wahkiakum, residing
at Cathlamet. My commission expires:_____

TERESA G. MCMAHON
NOTARY PUBLIC
STATE OF WASHINGTON
My Commission Expires: AUGUST 29, 2019